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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, for and on behalf of its member, BOISE CASCADE CORPORATION, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

and

THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION NO. 112, AFL-CIO, and

SOUTHWESTERN BUILDING TRADES COUNCIL OF MONTANA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Chamber of Commerce of the United States of America ("Chamber"), for and on behalf of its member, Boise Cascade Corporation ("Boise"), hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed and enforced an order of the National Labor Relations Board ("Board").

ORDERS AND OPINIONS BELOW.

The Order of the Court of Appeals denying Petition for Rehearing (Pet. App. p. 1a)[1] is not published. The Opinion of the Court of Appeals (Pet. App. p. 2a) is reported at 574 F.2d 457 (9th Cir. 1978). The Decision and Order of the Board (Pet. App. p. 14a) is reported at 217 NLRB 129. The decision of the Administrative Law Judge in this matter (Pet. App. p.

[1] "Pet. App." refers to the Petitioner's Appendix which is attached to this Petition.

25a) is attached to the Board Decision and is reported at 217 NLRB 129.

JURISDICTION.

The Decision and Judgment of the Court of Appeals was entered on March 8, 1978. (Pet. App. p. 2a). The Order of the Court of Appeals denying a timely-filed Petition for Rehearing was entered on May 4, 1978 (Pet. App. p. 1a). On July 28, 1978, this Court entered an Order extending Petitioner's time by which to file the instant Petition for Writ of Certiorari to August 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals' failure to find coercive conduct directed at employers who have no bargaining relationship with the pressuring labor organization violative of Sections §§ 8(e) and §§ 8(b)(4)(A) is contrary to *Connell.*[2]

2. Whether the Court of Appeals' failure to find a violation of § 8(e), while finding a violation of § 8(b)(4)(B) with regard to the same coercive conduct, is contrary to and inconsistent with the applicable statutory analysis set forth in *National Woodwork.*[3]

3. Whether the Court of Appeals, contrary to the principles set forth in *Pipefitters,*[4] failed to conclude that the "right

[2] *Connell Construction Company, Inc.* v. *The Plumbers and Steamfitters Local No. 100, et al.*, 421 U.S. 616 (1975) (hereinafter referred to as "Connell").

[3] *National Woodwork Manufacturers Assoc.* v. *NLRB*, 386 U.S. 612 (1967) (hereinafter referred to as "National Woodwork").

[4] *NLRB* v. *Enterprise Association, et al., and Pipefitters Local No. 638, et al.*, 429 U.S. 507 (1977) (hereinafter referred to as "Pipefitters").

to control test" is also applicable in determinating the legality of a work preservation clause under § 8(e).

4. Whether the Court of Appeals applied an erroneous standard of review by:

(a) relying on "good faith" rather than "foreseeable consequences" to determine a violation of § 8(b)(4) under the Court's *Radio Officers*[5] and *Burns and Roe*[6] decisions.

(b) failing to apply the common law agency test in holding the building trades council not an agent of the union's unlawful secondary boycott of modular homes, contrary to the Courts decision in *United Insurance.*[7]

(c) failing to explicate reasons for affirming the Board's denial of additional remedies necessary to dissipate the effects of the unlawful boycott and failing to state its reasons for denying such relief, contrary to the A.P.A.[8] and the principles approved by this Court in *Hecks*[9] and decisions of other circuits.

(d) failing to review the Board's refusal to admit into evidence a study on the "economic personality of the industry", contrary to the Court's *National Woodwork* "all the surrounding circumstances" test.

5. Whether the present record, including the improperly rejected documentary evidence, provides a timely opportunity

[5] *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954).

[6] *NLRB* v. *Local No. 825 Operating Engineers* (Burns and Roe, Inc.), 400 U.S. 297 (1971), (hereinafter referred to as "Burns and Roe").

[7] *NLRB* v. *United Insurance Company*, 390 U.S. 254 (1968), (hereinafter referred to as "United Insurance").

[8] Section 8(b) of the Administrative Procedure Act, 5 U.S.C., § 557(c).

[9] *NLRB* v. *Food Store Employees Local No. 347* (Hecks), 417 U.S. 1 (1973), (hereinafter referred to as "Hecks").

to reconsider the work preservation doctrine in light of the abuses portrayed in this case, and the intervening decision of the Court in *Connell.*

STATUTES INVOLVED.

The relevant provisions of §§ 8(b)(4)(A) and (B) and 8(e) of the National Labor Relations Act ("Act"), as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.*) and § 8(b) of the Administrative Procedure Act, as amended (80 Stat. 387, 5 U.S.C., § 500, *et seq.*, are set forth in Pet. App. at pp. 113a, *et seq.*

STATEMENT OF THE CASE.

I. The Facts in the Record.

Boise Cascade Corporation (hereinafter "Boise") manufactures "modular" or prefabricated homes in its factory in Pocatello, Idaho, which are transported in sections to, among other places, Butte, Montana. A modular home, as distinguished from traditional "stick built" homes, is built in a factory on an assembly line by job-trained workers other than journeymen or apprentice craftsmen. Modular homes are shipped from the factory as a finished product, completely wired, plumbed, painted, and carpeted and with all appliances installed. To make a modular home immediately habitable, it only needs to be transported to the home-site, placed on a foundation, and its two halves "stitched" together.

A modular home requires a substantial amount of work within the carpenter's craft before and after its delivery at the home-site, including laying the foundation, installing the stairs, stitching the home together, and building the garage. (Pet. App. pp. 33a and 34a).

In 1969, Local #112 Carpenters (hereinafter the "Union") and the Southwestern Building Trades Council (hereinafter the "Council") brought pressure against contractors employed by John A. Bender ("Bender"), a franchise modular home dealer, and Bender's customers to prevent them from erecting or

installing modular homes. (Pet. App. p. 34a). Bender filed a § 8(b)(4)(B) charge against the Union and the Council. The Board found their conduct to be violative of § 8(b)(4)(ii)(B) of the Act.[10] Because of the unlawful means and pressures utilized, the Board held that the labor organizations' alleged work preservation object did not insulate them from 8(b)(4) sanctions. (Pet. App. p. 35a).

At the time of the *Bender* case, *supra,* none of the craft unions in the Butte area had a contract containing a work preservation clause. (Pet. App. p. 36a). In 1971, the Union commenced negotiations with the carpentry contractors association for a new agreement, and after a three-month strike over the Union's demand for Article XXII (Pet. App. p. 104a), an alleged work preservation clause, the contractors capitulated. (Pet. App. p. 37a).

The contractors thereupon filed a charge with the Board that Article XXII violated § 8(e) of the Act. (Pet. App. p. 41a). In *United Brotherhood of Carpenters and Joiners of America, Local 112 AFL-CIO* (Silverbow Employers Association) 200 NLRB 205 (1972) (hereinafter called the "Silverbow case"), the Board dismissed the contractors' allegations that the Act had been violated on the narrow ground that "insufficient evidence" had been presented to show that Article XXII had other than a work preservation objective or that it had been obtained in an unlawful manner. (Pet. App. p. 41a).[11]

In May, 1972, the Union commenced a broad pattern of enforcement, including picketing, threats, and fines, which

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[10] Southwestern Building Trades Council of Montana, et al. (John A. Bender) 188 NLRB 224 (hereinafter called the "Bender case").

[11] The dissenting opinion of Board member Kennedy in the instant case states that *Silverbow* is not controlling here in view of the Union's unlawful intent as revealed by its enforcement efforts (Pet. App. p. 19a), and that the legitimacy of Article XXII as a work preservation clause can be ascertained only from the circumstances of the industry, the labor relations of the parties, and its enforcement history. (Pet. App. p. 19a fn. 10).

continued until November, 1972, when the charges filed in the instant case resulted in the issuance of a §10(1) injunction restraining the Union's coercive activity. (Pet. App. pp. 42a to 54a).

The lower court affirmed the Board's finding that the Union's enforcement of Article XXII against building contractors (Jovick, Perusich, and Lutey[12]) had an unlawful object of forcing or requiring the employees of those contractors to cease handling or performing work upon modular homes manufactured by Boise and Summit Valley Industries, Inc. ("Summit"), another manufacturer of modular homes which is located in Butte. These contractors, while being signatories to the work preservation clause, did not have the right to control or assign the particular work.

The lower court also affirmed the Board's finding that the Union's enforcement of Article XXII against persons who were not signatory to the clause and who had no bargaining relationship with the Union violated Section 8(b)(4)(B). These persons included McLeod, Boise's franchise dealer; Lemmons, a non-union carrier which Boise contracted to transport its homes to the Butte area; and Summit.

While Article XXII does not explicitly prohibit modular homes, the kind of home that it does permit is not the kind of home that was being constructed by Boise and Summit or the kind of home that could be constructed practically or economically in a factory which is removed from the home-site.[13]

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[12] The Union instructed its members who worked for Perusich Construction Co. and Lutey Construction Co., union contractors which did site preparation and finishing work with respect to Boise homes, to stop work or be fined, because Boise and the local franchiser were "unfair" and had utilized "scab labor" to set houses on their foundations.

[13] Section 3 of Article XXII (Pet. App. p. 104a) requires contractor signatories to perform the following job tasks at the home-

(Footnote continued on following page)

The work which Article XXII requires the contractor to perform at the home-site could only be done if the house arrived as a "shell" without the factory-installed components and completely furnished interiors which are characteristic of any modular home and are the distinguishing cost-saving features.

II. The Decisions and Order Below.

A. The Board's Decision and Order.

The Board found that the Union had violated §§ 8(b)(4)(B) and 8(b)(4)(D) of the Act. Adopting the "right of control" analysis, the Board held that enforcement of a work preservation clause against employers who had no right to control or assign the work and/or who had no bargaining relationship with the pressuring union was secondary activity. (Pet. App. pp. 15a and 16a).

The Board also held that the identical coercive conduct did not violate Sections 8(b)(4)(A) or 8(e), stating, contrary to the dissent of Member Kennedy, that the clause was clearly lawful on its face, that evidence with regard to its enforcement was not relevant (Pet. App., p. 15a), and that, accordingly, Article XXII did not violate § 8(e). (Pet App. p. 84a).

Member Kennedy dissented on the ground that a determination whether Article XXII was a legitimate work preservation

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(Footnote continued from preceding page)

site: the installation of all exterior siding or finishing, or in the alternative, all wallboards and/or paneling; the installation of all exterior trim on the structure, or in the alternative, all interior trim on the structure; the installation of all interior doors on the structure; the shingling of all roofs; the installation of all cabinets and shelving, and the installation of all stairs and/or bannisters. Since the concept of a modular homes requires many, if not all, of the tasks enumerated in Section 3 of Article XXII to be performed at the factory, not at the home-site, a contractor which is bound by Article XXII is prevented from erecting modular homes.

clause or is designed to have secondary impact can only be answered by an analysis of its context which includes evidence of its enforcement history. (Pet. App. p. 19a). Further, factory work on a modular home and job-site work on stick built homes are in completely different categories (Pet. App. p. 22a), and the disparity of prices of such homes place them in entirely separate markets. (Pet. App. p. 23a).

B. The Decision of the Court of Appeals.

The Court of Appeals affirmed the Board's decision that the Union's pressures violated § 8(b)(4)(i)(ii)(B) and 8(b)(4)(i)(ii)(D). Explication of its reasons in finding conduct violative of § 8(b)(4)(B) under the "right to control test" is limited to pressure against contractors who had no right to assign the work.

In finding no violation of § 8(e), and making no reference to § 8(b)(4)(A), the Court of Appeals held that a clause such as Article XXII can be "valid despite the fact some of the unions enforcement attempts violate Section 8(b)(4)(B)" (Pet. App. p. 9a) and that the Union's improper enforcement activity was excused because the Union had miscalculated the circumstances under which it could enforce the clause. (Pet. App. p. 9a).

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

This case presents important and significant questions concerning the validity of an alleged work preservation clause under § 8(e), where enforcement is sought against employers who have no bargaining relationship with the signatory union, contrary to the Court's *Connell* decision, *supra* at fn. 2.

The conflict between the Court of Appeals' decision and the Court's *National Woodwork, supra* at fn. 3, and *Pipefitters, supra* at fn. 4, decisions gives the Court the opportunity to clarify the "surrounding circumstances" test of *National Woodwork* and the "right to control" test affirmed in *Pipefitters* as it applies to non-signatories, where conduct to enforce a work preservation clause was found by the Court of Appeals to have violated § 8(b)(4)(B), but was not considered determinative for a violation of § 8(e). The critical question is whether post-entry coercive enforcement reveals an initial secondary purpose in the demand for and entry into the alleged work preservation clause.

The instant matter also presents this Court with a timely opportunity to re-examine the work preservation concept in a factual setting where its purported legal application results in the total exclusion of modular homes from a geographic market.

I. The Court Of Appeals' Failure To Find Coercive Conduct Directed At Employers Who Have No Bargaining Relationship With The Pressuring Labor Organization Violative Of § 8(e) And § 8(b)(4)(A) Is Contrary To *Connell.*

In the landmark *Connell* decision, the Court held that efforts to enforce a restrictive sub-contracting clause benefiting members of the local union violated § 8(e) when coercive enforcement was sought against an employer with whom the union had no bargaining relationship. Likewise, in the instant case, the Union's efforts to enforce a work preservation clause against persons with whom the Union had no bargaining relationship, such as Boise and Summit, must also be found to violate § 8(e).

The teaching of *Connell* is that whatever protection a union enjoys under the Act is pursuant to an existing bargaining relationship or at least a *bona fide* effort to obtain one. While a

"subcontracting" clause was involved in *Connell,* a work preservation clause, which as a secondary object, seeks similar benefits for members of a collective bargaining unit. One basis for legitimizing the "work preservation" clause in *National Woodwork* was the Court's reliance upon its analysis of "subcontracting clauses" in *Fibreboard.*[14]

In *Connell* the Court fully incorporates the *National Woodwork* legislative analysis declaring voluntary maintenance of a "hot cargo" clause to be violative of § 8(e).[15]

In *National Woodwork,* contrary to the instant case, the carpenters took no action against non-signatory parties.[16] The Court's *National Woodwork* holding does not countenance

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[14] *Fibreboard Paper Prods. Corp.* v. *NLRB,* 379 U.S. 203 (1964), is cited with approval in *National Woodwork,* 386 U.S. at 642.

[15] The Court's analysis in *Connell,* 421 U.S. at 628, states:

> "Section 8(e) was part of a legislative program designed to plug technical loopholes in § 8(b)(4)'s general prohibition of secondary activities. In § 8(e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by Section 8(b)(4). (Citing *National Woodwork,* 386 U.S. at 634).

National Woodwork, 386 U.S. at 634, states:

> "The *Sand Door* decision (viz., *Carpenter's Local 1976* v. *NLRB* 357 U.S. 93 (1958), which permitted maintenance of "hot cargo" agreements which were voluntarily entered into) was believed by Congress not only to create the possibility of damage actions against employers for breach of "hot cargo" clauses but also to exert subtle pressures upon employers to engage in voluntary "boycotts'." (386 U.S. at 634).

Congress specifically overrode the *Sand Door* decision, supra, by enacting § 8(e).

[16] The *Board* in *National Woodwork* found that the Carpenters limited their refusals to hang pre-cut doors to job-sites where work was being done by employers signatory to the Philadelphia area agreement. (See 149 NLRB 646, 650-651 (1964)). Of course, there the Frouge Corp. was a contractor from Bridgeport, Connecticut, but was working in Philadelphia under a contract with the carpenters which required it "to abide by all the local rules and regulations of the area in which it worked." (149 NLRB at 650).

coercive pressure which the Union applied in the instant case directly against manufacturers of the boycotted product. Accordingly, a distinction must be drawn between the pressures exerted in *National Woodwork,* which were directed solely at employers to force them to agree that their employees, who were represented by the union, would perform all work within the union's jurisdiction, and the pressures exerted here, which were a direct attempt to force the manufacturers of the product and the manufacturers' employees, who were represented by other labor organizations, to cease marketing a new and different type of housing in Butte.

This distinction finds support in *Connell* where the union defended an antitrust suit under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, on the ground that its contractual clause limiting the employer's authority to subcontract only to contractors subject to the union's current agreement was lawful under § 8(e). The Court, however, read § 8(e) narrowly:

> "[w]e think [§ 8(e)'s] authorization extends only to agreements in the context of collective bargaining relationships and, in light of congressional reference to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well. (Footnote omitted) (421 U.S. at 633).

In the instant action, no collective bargaining relationship existed between the Union and Boise or Summit, and there were no non-union employees on modular home-sites (except for persons like Lemmons who were hired to haul the homes from the factory to the job-site). Consequently, the Union had no need to protect its members from working alongside non-union men, because foundation work is completed before the modular house arrives from the factory and the "stitch" work does not commence until after the transport crew, which places the house on the foundation, returns to the factory.

The Union's direct coercion of Boise and Summit, outside a bargaining relationship, is contrary to *Connell* and demon-

strates that the Union enforced Article XXII to thwart the introduction of modular homes into Butte. This purpose was further shown by the Union's conduct and negotiations prior to the initial execution of Article XXII and the Union's early efforts to keep modular housing out of the Butte market, as found unlawful in the *Bender* case, infra. p. 4. The Union's attempt to close its jurisdiction to modular homes shows that Article XXII was conceived and enforced to declare modular homes to be "hot cargo" and was therefore in violation of § 8(e).

II. Whether The Court Of Appeals' Failure To Find A Violation Of § 8(e), While Finding A Violation Of § 8(b)(4)(B) With Regard To The Same Coercive Conduct, Is Contrary To And Inconsistent With The Applicable Statutory Analysis Set Forth In *National Woodwork.*

The "work preservation clause" in *National Woodwork* was challenged, as Article XXII is challenged in the instant action, under both Sections 8(e) and 8(b)(4)(B) of the Act. The Court interpreted the prohibition of the statutory provisions by reference to each other and concluded "[t]hat Congress meant that both §§ 8(e) and 8(b)(4)(B) reach only secondary pressures." (386 U.S. at 638.) Accord: *Pipefitters,* where the Court stated that "the scope of the prohibitions in §§ 8(b)(4)(B) and 8(e) are essentially identical". (429 U.S. at 521 n.8)

The common issues of the legality of Article XXII and its maintenance (or enforcement) under §§ 8(e) and 8(b)(4)(B), are *both* to be determined by application of the same evidentiary standard. As the Court further held in *National Woodwork:*

> "The determination whether [a challenged work preservation clause] and its enforcement violated §§ 8(e) and 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." (386 U.S. at 644).
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> * * *
>
> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. (Footnote omitted). (386 U.S. at 645).

In determining the legality of the union's agreement and conduct in *National Woodwork,* the Court looked not just to the clause itself but also to the union's job-site enforcement conduct as mandated under the "surrounding circumstances" test. (386 U.S. at 645-46.) The Court's emphasis upon the enforcement of a challenged clause as the primary measure of its legality was and still is required by *Sand Door,* 357 U.S. at 105-109, where it was held, as the Court recently emphasized in *Pipefitters,* 429 U.S. at 516, that "the legality of the union's conduct is to be reviewed at the time of the boycott."

When one applies this test to *National Woodwork,* it is clear why the Court upheld the Board's dismissal of the § 8(e) charges. All the job-site pressure in the record before the Court was directed at an employer which was both a signatory to the challenged clause and possessed the full authority to resolve the union's contract violation claim at the job-site. Since the pressured contractor had control over the job-site work and employed workers represented by the union, it could not be fairly maintained that the work preservation clause or its enforcement was "to secure union objectives elsewhere."

In contrast, in the instant action all the Union's job-site pressures were directed against signatory contractors, non-signatory carriers, and franchise parties which had no control over modular home specifications and thus could not effectively meet the requirements of Article XXII. The Board and the

Court of Appeals agreed (Pet. App., pp 11a and 12a) that this conduct violated § 8(b)(4)(B).

Furthermore, the Union picketed and threatened retaliation against Boise and Summit, modular home manufacturers, to compel them either to redesign their modular homes to comply with Article XXII or face job-site and plant picketing. Because these manufacturers were not signatories to Article XXII and because the Union did not represent any of their employees, the Board and the Court of Appeals agreed (Pet. App., pp. 11a and 12a) that this conduct violated Section 8(b)(4)(B), even though these employers had no control over the amount of necessary job-site work on the modular homes.

Unlike *National Woodwork*, the Union's massive and unlawful enforcement campaign in the instant action was therefore not directed at preserving job-site work for its members but to force modular home manufacturers to cease doing business with contractors within its jurisdiction or to force these manufacturers to conform their manufacturing processes to Article XXII. As the Board found and the Court of Appeals affirmed without analysis, either alternative would be a proscribed objection violative of § 8(b)(4)(B) of the Act. (Pet. App., p. 84a and 91a).

On this record, it is plain under *National Woodwork* that Article XXII is not an "agreement addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." (386 U.S. at 645). Prior to the Union's attempt to obtain this clause, the Union (and the Council) had unlawfully attempted to force contractors which lacked control over the specifications for modular homes to cease doing business with modular home manufacturers even though the Union was fully aware that no local contractor had any control over that portion of the job-site work rendered unnecessary by assembly line modular manufacturing.

Moreover, the Union proposed Article XXII specifically to "reverse the *Bender* case", where the Board had held such

secondary pressures violated § 8(b)(4)(B), in order to keep pre-built homes out of Butte. Thus, the Union sought Article XXII as a coercive means of forcing signatory employers to assign such work to job-site employees with full knowledge that signatory parties had no control over the work. This knowledge, coupled with the actual enforcement efforts directed against these contractors, demonstrates conclusively that the Union originated Article XXII, not to protect job-site work, but to secure union objectives elsewhere in violation of § 8(e). As member Kennedy observed in his dissent from the Board's decision, Article XXII prohibits union members from doing any job-site work on modular homes. The object of the clause is therefore not just to prevent non-union employees, but to preclude all persons from engaging in such work.

The Court of Appeals thus misread *National Woodwork* by incorrectly applying different tests of legality with respect to §§ 8(e) and 8(b)(4)(B), rather than considering the identical scope of both prohibitions in light of the union's enforcement conduct coupled with the "surrounding circumstances"[17] of the origin and execution of the challenged clause.

Failure to grant review would allow unions to escape the full remedial consequences of product boycotts and to retain the threat of future boycotts by simply concealing that object in the language of a so-called work preservation clause. The mere existence of such a clause operates as a subtle form of prohibited voluntary boycott (*supra*, p. 10 fn. 15). The decision below is clearly contrary to *National Woodwork* which mandates an analysis which embraces both a determination whether the union's enforcement conduct *and* whether the alleged work preservation clause are secondary, and therefore unlawful. A clear conflict on such important questions warrants review by this Court.

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[17] An additional "surrounding circumstances" requirement under *National Woodwork*, which the Court of Appeals failed to consider, was the improperly rejected study on the "Economic Personality of the Industry" (*infra*, p. 25).

III. The Court Of Appeals Contrary To The Principles Set Forth In *Pipefitters* Failed To Conclude That The "Right To Control" Test Is Also Applicable In Determining The Legality Of A Work Preservation Clause Under § 8(e).

The Court in *Pipefitters, supra* at fn. 4, held that coercive pressure to enforce a work preservation clause against persons who have no right to control or assign the work is violative of § 8(b)(4)(B). The Court once again re-affirmed its *National Woodwork* analysis of the interrelationship between §§ 8(e) and 8(b)(4)(B) in determining under what circumstances enforcement of a work preservation clause and the clause itself are secondary.[18]

The instant case presents the Court with the first opportunity to examine a work preservation situation involving alleged violations of § 8(e) *and* § 8(b)(4)(B) in which the persons (Boise and Summit)[19] against whom enforcement is sought

[18] The Court stated in *Pipefitters* that "[O]ur rationale was *not* that the work preservation provision was valid under § 8(e) and that *therefore* it could be enforced by striking or picketing without violating § 8(b)(4)(B). Expressly recognizing the continuing validity of the *Sand Door* decision that a valid contract does not immunize conduct otherwise violative of § 8(b)(4), 386 U.S. at 634, *we held that neither § 8(b)(4)(B) nor § 8(e) forbade primary activity* by employees designed to preserve for themselves work traditionally done by them and that on this basis the union's conduct violated neither section." (429 U.S. at 519) (emphasis added).

[19] While there is no question about the Union's lack of a bargaining relationship with Boise and Summit, dissenting Board Member Kennedy holds that these modular housing manufacturers do not have the right to assign or control the work either. (Pet. App. p. 21a). There are certainly some instances in the record where the ultimate buyer can choose among various specifications with regard to the interior of a modular home as well as the kind of garage he desires. In many instances, however, the manufacturer, Boise or Summit, does in fact have the right to control or assign the work.

have no bargaining relationship with the union but do have the right to assign or control the work[20]

Petitioner urges review of the decision below so that the "right to control" test can be made applicable equally to § 8(b)(4)(B) and § 8(e) inquiries into alleged secondary aspects of a work preservation clause or its enforcement. A test suggested by the principles set forth in *Pipefitters* is that application of the right to control test would result in a violation of § 8(b)(4)(B) or §§ 8(e) and 8(b)(4)(A) where union pressures are exerted against an employer who lacks *both* the right to assign or control the work *as well as* a collective bargaining relationship with the union.[21] Even though the validity of the work preservation clause itself was not involved in *Pipefitters,* the above suggested test would seem to follow the principles enunciated.[22]

[20] There is another group of contractors (Perusich, Lutey and Jovick, *supra,* p. 9 fn. 12) to whom coercive pressure was applied, clearly within the holding of *Pipefitters,* who have no right to control or assign the work, but do not have a bargaining relationship with the Union. (Pet. App. pp. 5a-6a). The Court of Appeals appears to find that application of the *Pipefitters* "right to control" test results in § 8(b)(4)(B) as to each group, but fails to find the "right to control" test applicable to either group under § 8(e). (Pet. App. 9a).

[21] Such a test would be fully consistent with *National Woodwork* where no § 8(e) or § 8(b)(4)(B) violation was found because Frouge had *both* a bargaining relationship and right to control or assign the work.

[22] In *Pipefitters* the Court stated that "[T]he validity of the will-not-handle provision in this case was not challenged by the charging party, and the Board referred to it as a valid provision. Because the scope of the prohibitions in §§ 8(b)(4)(B) and 8(e) are essentially identical, except where the proscriptions in § 8(e) are limited by the provisions in that section, the Court of Appeals regarded as anomolous that a valid provision in a collective bargaining contract could not be enforced through economic pressure exerted by the Union. This conclusion ignores the substance of our decision in *Sand Door.* Even though a work preservation clause may be valid in its in-

(Footnote continued on following page)

In *George Koch Sons, Inc.* v. *NLRB,* 490 F.2d 323,327 (4th Cir. 1973), which *Pipefitters* cites as a "well reasoned opinion" (97 S.Ct. at 903 fn. 15), the Fourth Circuit not only found the Board's "right to control" test (as subsequently approved in *Pipefitters)* to be appropriate where the pressured employer has no right to control or assign the work, but also reasoned that pressure against General Electric Company, which had the right to assign or control the work, would also have been unlawful secondary activity violative of § 8(b)(4)(B), because General Electric was not in contractual privity with the striking union. (490 F.2d at 327).

The Board in the instant case, in reliance upon the aforementioned *dicta* in *Koch, supra,* for the first time found a violation of § 8(b)(4)(B) in a situation where the pressured employer was outside the bargaining relationship but had the right to control or assign the work. (Pet. App. p. 69a). It is not clear, however, whether the Court of Appeals in the instant case actually adopted the Board's rationale for finding a § 8(b)(4)(B) violation against an employer in the position of Boise who had no bargaining relationship with the Union.[23]

(Footnote continued from preceding page)

tendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by Section 8(b)(4)(B). See *George Koch Sons, Inc.* v. *NLRB,* 490 F.2d 323, 327 (4th Cir., 1973)." (429 U.S. at 521 fn. 8).

[23] The Court of Appeals in the instant case broadly affirmed the Board's decision without any discussion of the lack of a bargaining relationship, as follows: "Since the Board used the proper test as originally stated in *National Woodwork, supra,* and reaffirmed in *Pipefitters, supra,* the order of the Board as to (all the § 8(b)(4)(B)) violations will be affirmed." See fn. 9 of the Court of Appeals' decision which states that " ... To the extent *Western Monolithics Concrete Products* v. *NLRB,* 446 F.2d (9th Cir. 1971) is consistent, it cannot stand; particularly after resolution of the conflicts among the circuits in *Pipefitters.*" (Pet. App. p. 11a).

The Court of Appeals' only reference to union pressures against persons who *have* control over the construction specifications which

(Footnote continued on following page)

The Board, in its Second Supplemental Decision in *Simmons*[24] (Pet. App. p. 106a), following the Court's remand, found the reach of *Pipefitters* to be sufficiently broad to encompass pressure against a non-signatory to obtain premium pay in lieu of work to be violative of § 8(b)(4)(B).

(Footnote continued from preceding page)

determine the extent of work necessary at the jobsite, but do not employ union members or have no collective bargaining relationship with the pressuring union is the suggestion that *Western Monolithics* is inconsistent with *Pipefitters.* In fact, *Western Monolithics* was the first case which applied the proscription of § 8(b)(4) to such pressures. The Board in the instant case (Pet. App. p. 69a, n. 9) adopted Judge Wright's view, 446 F.2d at 527, that "control" alone could not legitimize coercive pressure against persons who did not employ workers represented by the union and who were thus outside the reach of "work preservation" objectives.

The confusing reference to *Western Monolithics* by the Court of Appeals becomes critical in attempts to evaluate the decision in light of the principles in *Pipefitters* concerning the identical tests to be employed under §§ 8(e) and 8(b)(4)(B) for persons outside the bargaining relationship.

[24] In *NLRB* v. *Local 742 Carpenters* ("*Simmons*"), 533 F.2d 683 (1976), *cert. granted, vacated and remanded,* 430 U.S. 912 (1977) (Pet. App. p. 106a-112a), the D.C. Circuit had found that union pressure against a non-signatory employer in support of a work preservation object did not violate § 8(b)(4)(B) notwithstanding the Court's *Connell* decision. The Court vacated the lower court's decision, and the case was remanded to the Board (237 NLRB 82 at Pet. App. p. 106a) pursuant to the *Pipefitters* decision, but the *Pipefitters* decision would not be controlling upon the D.C. Circuit should there be an appeal taken from the Board's Second Supplemental Decision (Pet. App. p. 106a), as the non-signatory aspect of the right to control test was not before the Court in *Pipefitters.*

In *Simmons, supra,* it is undisputed that neither the local agreement between the union and the contractor association nor Simmons' contract with the international union contains any limitations upon the type of materials which may be utilized in meeting Simmons' contractual obligation to the hospital. This lack of contractual privity was one of the issues raised by *Simmons* in its Petition for Certiorari as to how its facts were different from those of *Pipefitters* (*Simmons'* Petition for Certiorari, No. 75-1755, pp. 9-14).

Petitioner agrees with the Board that principles enunciated in *Pipefitters* broadly prohibit coercive conduct even against non-signatories; the Court, however, has not specifically addressed the applicability of the right to control test to non-signatories for purposes of § 8(e). Accepting review in the instant case would settle this important area of labor relations law.

IV. The Lower Court Applied Erroneous Standards Of Review, as follows:

A. In holding that Article XXII does not violate § 8(e), the Court rejected the "foreseeable consequences" test utilized by this Court in Burns and Roe, supra, and invoked an erroneous standard based on the Union's "good faith".

> The Court of Appeals held in the instant action that
>
> "[b]ecause the union miscalculates the circumstances under which it can act to enforce the clause, it does not render the clause invalid (under § 8(e))." (Pet. App. p. 9a).

The Union's miscalculation or mistake, however, does not sanction Article XXII's implicit secondary pressure to preclude the introduction of modular housing in the Butte area.

In *Burns and Roe, supra* at fn. 6, the union stopped work on an entire project to force the general contractor either to force a change in a subcontractors' policies with respect to job assignments or to terminate the subcontractor. The Court held that the "foreseeable consequence" and the "clear implication" of the union's secondary conduct against the general contractor and other subcontractors which were not involved in the dispute violated Section 8(b)(4)(B). (400 U.S. at 305).[25] Also see *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 45 (1953).

[25] While the *Burns and Roe* case, *supra* at fn. 6, involved Sec. 8(b)(4)(B), rather than Sec. 8(e), the test for coercive conduct is identical with respect to each section. See discussion in Part II of this Petition, *supra* at pp. 12 to 16).

The "foreseeable consequence" and "the clear implication" of the express terms and the application of Article XXII in the instant action was to preclude the introduction of modular housing in the Butte area in violation of § 8, irrespective of any miscalculation or mistake the Union might have made. Therefore, the lower court applied an erroneous standard of review in holding that Article XXII did not violate § 8(e) because the Union had acted in good faith.[26]

B. In holding that the Council was not an agent of the Union, the Court of Appeals rejected the Court's decision in United Insurance, supra, requiring such questions to be determined in accordance with the common law of agency.

The Court of Appeals in the instant action found that the Union requested the Council's assistance in the campaign against modular housing, as follows:

> "[d]uring the Union's action against the influx of modular houses, the Union requested the help of the Southwest Building Trades Council of Montana. (Pet. App. p. 12a).

Nonetheless, the Court of Appeals reviewed the alleged agency of the Council as a pure question of fact with respect to only one of a number of different acts by the Council without any discussion of the applicable common law agency principles. The determinative question is not, as misconceived by the Court of Appeals (Pet. App. p. 13(a)), one of "conduct" but of the *relationship* between two labor organizations. If under agency precepts the Council is an agent of the Union, its conduct in furtherance of the Union's unlawful boycott consitutes unlawful coercion *vel non* under § 8(b)(4) because Congress intended to foreclose all "threats [of] labor trouble or other consequences" and to prohibit the carrying out of such threats by a "strike or

[26] The Court of Appeals also applied the erroneous standard of "sufficient evidence" rather than "substantial evidence" as required by *Universal Camera Corp.* v. *NLRB*, 340 U.S. 374 (1951).

other economic relation."[27] Accordingly the motives of labor organizations charged with unlawful boycotts are "immaterial" because Congress intended to grant neutral parties broad protection from unions and their agents.

The Council acted as the agent of the Union in threatening work stoppages if employees represented by the Teamsters attempted to utilize jobsite jurisdiction for the installation of modular homes. Thus, the relationship between the Union and the Council commenced as the Board found with the first attempt to bring modular homes within the Union's jurisdiction. *John Bender, supra.* at p. 4. Thereafter when Summit first opened its modular plant, the Council's President accompanied the Union's business agent to explain that such an operation violated Article XXII. Thereafter, the Union specifically asked for the Council's "support" to aid its effort to enforce Article XXII, and the Union expected some form of Council action. On this record, it is plain that the Council acted well within the scope of its apparent authority delegated by the Union to restrain Summit's employees from exercising their jobsite jurisdiction set forth in the Teamsters-Summit contract to install modular homes.

C. In failing to explicate reasons for affirming the Board's denial of additional remedies necessary to dissipate the effects of the Union's and the Council's unlawful boycott and in failing to address the Board's failure to state any reasons for denying such relief, the Court of Appeals violated § 8(b) of the Administrative Procedure Act, supra, and § 10(c) of the Labor Act, supra.

Without any explanation, the Court of Appeals affirmed the Board's Order which in turn without any explanation had

[27] II NLRB, Legislative History of Labor Labor-Management Reporting and Disclosure Act, 1959, at 1568(2), 1523(1), 1581(1) (1959).

denied Petitioner's request for additional remedies required by Section 10(c) of the Labor Act.[28]

Evidence in support of each of the extraordinary remedies which were requested was fully presented on the record. These additional remedies relate to the Union's unlawful efforts to enforce Article XXII against contractors, manufacturers, suppliers, and third persons involved in introducing modular homes within the Union's jurisdiction. Thus, the lower court's omission cannot be explained by its affirmance of the Board's failure to find §§ 8(e) and 8(b)(4)(A) violations for which the remedy sought is expungement.

While these remedies may be novel and extraordinary, such adjectives do not themselves provide a basis for a refusal to utilize them where, as here, such redress is essential. The

[28] Specifically, the Chamber requested the Board to order either the Union's business agent or an agent of the Board to read a notice to the members of the Union advising them of the findings and conclusions of the Board, the Union's abandonment of opposition to the introduction of modular housing in the Butte community, and the union members' freedom to perform work on such houses without fear of Union reprisals. A request was also made that the Union be ordered to mail a letter to the employers associations and to every contractor employer bound by Article XXII giving notice of these matters. Finally, the additional request was made that the Union be ordered to publish at its expense a notice in the Butte newspaper advising the public of the public's right, without fear of Union instigated disruptions or delay, to purchase modular homes manufactured by Boise Cascade Corp., Summit Valley Industries, Inc., or any other modular home manufacturer. The latter remedy was needed to restore public confidence in the option of modular housing for Butte residents because the Union had widely publicized its modular home boycott in the local newspaper. The evidence in the record establishes the method by which the Union normally communicates with its members. Because Article XXII was not communicated solely in the normal manner, but was also the subject of newspaper advertisements, the effect of the Union's unlawful conduct cannot be remedied unless the Union makes a retraction through the same media as its unlawful act was commited.

Board has imposed extraordinary and novel remedies against employers when the violation constituted a flagrant disregard for the Board's policies. See *Tiidee Products, Inc.* v. *NLRB* (Int'l. Union of Elec., Radio & Mach. Wkrs., AFL-CIO), 502 F.2d 349 (D.C. Cir. 1974), *cert. denied* 402 U.S. 991 (1975), as approved by the *Hecks* case, *supra* at fn. 9.

The Court of Appeals' silence on this question violates its statutory obligation under § 8(b) of the Administrative Procedure Act, 5 U.S.C., § 557(c), to require agencies to explicate "the reasons or basis" for findings and conclusions "on all material issues of fact, law, or discretion...." (Pet. App. 114a)

The Court and various circuits have recognized that this principle applies to remedial orders issued pursuant to § 10(c) of the Act. *NLRB* v. *Local 469, Plumbers,* 300 F.2d 649 654 (9th Cir. 1962); *IUEW* v. *NLRB (Tiidee Prods., Inc.)* 426 F.2d 1243, 1250 (D.C. Cir.), *cert. denied,* 400 U.S. 950 (1970). The Court of Appeals' tacit affirmance of the Board's Order discloses no basis for the Board's failure to adopt the Chamber's remedies and improperly affirms a decision which totally fails to conform to the requirements § 8(b) of the APA, *supra.*

D. In failing to review the Board's refusal to admit into evidence studies on the economic personality of the modular housing industry, the Court of Appeals failed to follow the "all the surrounding circumstances" test established by this Court in National Woodwork.

In an effort to adduce evidence that the object of Article XXII and the boycott to enforce that clause was not preservation of work, but "to satisfy union objectives elsewhere", petitioner offered two exhibits, *viz.* "The Economic Personality of the Construction Industry and the Need for Change" (Exhibit 10) and "A Theoretical Analysis of the Work Preservation Concept (Exhibit 19), as evidence (in addition to expert testimony) that, *inter alia,* 1) modular housing and stick built homes are not price-competitive and therefore cannot be substituted for each other; 2) modular housing increases, rather than decreases, the employment of carpenters in the Butte area; 3) modular housing brings new industry to areas like Butte which historically have experienced scant growth; 4) resistence to technological change in an effort to expand employment is generally counterproductive in the long run; and 5) work preservation generally does not increase productivity or employment. (Pet App. pp. 79a to 80a).[29]

The Board credited these reports and stated in its opinion that this documentary evidence was considered in reaching its decision:

> "[T]he economic data in the record relating to the Butte area alone ... does not appear in conflict with the broader economic conclusions covered by the studies. ..." (Pet. App. p. 79a at fn. 10).

In *National Woodwork,* the Court held that a determination whether a "will not handle" provision was lawful under §§ 8(e) and 8(b)(4)(B) "... *cannot* be made without an inquiry into whether under *all the circumstances,* the union's objective was preservation of work ... or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere." (Footnoe 38: "As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and employers who would be boycotted, and the economic personality of the industry." (386 U.S. at 644) (Emphasis added).

In the instant action, the evidence which was sought to be introduced into the record was directly relevant to the question whether Article XXII and the Union's enforcement efforts were intended to preserve work for the Union or to deprive Boise

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[29] The subject matter of the rejected exhibits was made a part of the record in their entirety through a *voir dire* offer of proof.

and other manufacturers of a market and to deprive the public of a product for which there was no price-competitive substitute.

V. The Present Record, Including The Improperly Rejected Documentary Evidence, Provides A Timely Opportunity To Reconsider The Work Preservation Doctrine In Light Of The Abuses Portrayed In This Case And The Intervening Decision Of The Court In *Connell.*

In *Connell* the Court recognized that

> "[t]he agreements with Connell and other general contractors indiscriminately excluded non-union subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. *Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers.*" (421 U.S. at 623) (emphasis added).

If curtailment of competition is not a goal of labor policy, then there must be a remedy for such conduct under labor policy. Notwithstanding the antitrust ramifications in *Connell* (as well as the instant case), an important question for the Court to answer is whether the remedy for such anticompetitive union conduct is § 8(e), the analogue of the antitrust laws, without regard to whether the clause has a work preservation object.

In *Connell,* Mr. Justice Powell suggests that a union acting alone could refuse to sign collective bargaining agreements or otherwise exclude certain employers and thereby

> ". . . create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley, supra.*" (421 U.S. at 625)

The instant action provides the facts which fit the theory in *Connell.* The Union here established an enclave in which modular homes were successfully excluded from the housing market, but which had the avowed purpose of preserving work

(which the lower court accepted by reason of its refusal to void the clause). An important question here presented is whether a work preservation clause, notwithstanding its validity under *National Woodwork,* can stand when it has the proscribed effect referred to in *Connell* of curtailing competition. Consequently, this case presents a compelling opportunity for the Court to reexamine the work preservation concept in light of *Connell.*

In the intervening decision in *Connell,* the Court considered many of the factors that were of concern to Mr. Justice Harlan in *National Woodwork, viz.* the union's interest in protecting its workers from a dimunition of work flowing from changes in technology; the union traditionally performed the tasks sought to be protected; and the union had no motive other than work preservation, but in the instant action, none of these factors are present. The Union did not seek to preserve work on modular homes for its own members, but rather attemped to exclude the product from the market and thereby prevent anyone from performing this work. Since none of the factors in *National Woodwork* referred to by Mr. Justice Harlan are present in the instant action, the majority of the Court presumably would not apply the doctrine of work preservation to the circumstances of this case, *viz.* a total exclusion from a market.

Whereas the subscontracting agreements in *Connell* excluded certain people from the relevant market, *viz.* non-union subcontractors, the restrictive agreement in the instant action excludes a product, *viz.* modular housing. What was said of subcontracting agreements in *Connell* has equal application here. The instant case, therefore, gives the Court the opportunity to consider *National Woodwork* in light of more recent cases[30] and the need for the Court to accommodate the labor law with other conflicting national policies.

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[30] Mr. Justice White in *Local Union No. 189, Amalgamated Meat Cutters, et al.* v. *Jewel Tea Co., Inc.,* 381 U.S. 676, 692 (1965), reasoned that if self-service supermarkets operated without butchers

(Footnote continued on following page)

The Union's sole object and the exclusive effect was anticompetitive. Notwithstanding the shortage of housing in Butte, Montana, Article XXII and its enforcement banned modular homes. The Union did not seek to have its own members work on modular homes; rather, the Union sought to prevent anyone from performing such work. The Court, in the facts of this case, has a ready opportunity to determine what kind of effect valid work preservation should foreseeably have upon the Union's jobs, and the significance of an increase in union jobs elsewhere. Here, the effect of the Union's campaign was likely to decrease work not only for its own members, but also for factory workers and others.

In Butte there was a specific demand and need for housing in the price range of modular homes which could not be competitively met by union-supported traditional "stick built" homes. Thus, continued support of the work preservation concept resulted in no real gain for workers, yet conflicted with local and national housing and employment needs. The detailed record in the instant case, including the comprehensive data in "The Economic Personality of the Construction Industry and the Need for Technological Change" and "A Theoretical Analysis of the Work Preservation Concept" (Pet. App. p. 78a, Fn. 11), present an excellent opportunity for this Court to reconsider the "work preservation doctrine" in light of National Labor Policy, as defined by *Connell*, which disfavors the "curtailment of competition," and the work protection concerns enunciated by the Court in *National Woodwork*.

(Footnote continued from preceding page)

after 6 P.M. there would be no loss of union work. In such case, the Court stated that "the obvious restraint (would be) on the product market . . . to protect one group of employers from competition by another. . . ." (381 U.S., at 692). Similar restraints were found violative of § 8(e) in *Connell*. In the instant case, there was also no loss of work, just as in Justice White's analysis of *Jewel Tea*. Such conflicting analyses in these more recent cases requires reexamination of *National Woodwork*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA for and on behalf of its member BOISE CASCADE CORPORATION,
Petitioners-Appellants,
vs.
THE NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellees.
and
UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION #112, AFL-CIO,
Intervenor.

No. 75-2064

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION #112, AFL-CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Intervenor.

No. 75-2770

ORDER

Before: MERRILL AND TRASK, Circuit Judges, and TAKASUGI,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Trask has voted to reject the suggestion for a rehearing en banc. Judges Merrill and Takasugi recommend against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA for and on behalf of its member BOISE CASCADE CORPORATION,

Petitioners-Appellants,

vs. No. 75-2064

THE NATIONAL LABOR RELATIONS BOARD,

Respondent-Appellees.

and

SUMMIT VALLEY INDUSTRIES, INC.,

Petitioner,

vs. No. 75-2166

THE NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION #112, AFL-CIO,

Petitioner,

vs. No. 75-2770

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and OPINION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Intervenor.

Before: MERRILL AND TRASK, Circuit Judges, and TAKASUGI,* District Judge

TRASK, Circuit Judge:

This case arises out of the continuing battle by labor unions against prefabricated building materials that limit on-site construction work.[1]

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* Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

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[1] *See* Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust,* 89 Harv.L.Rev. 904 (1976).

The National Labor Relations Board found that the United Brotherhood of Carpenters and Joiners of America, Local No. 112 (the Union) violated Section 8(b)(4)(B) and 8(b)(4)(D)[2] of the National Labor Relations Act[3] in its activities attempting to enforce a work preservation clause.

The matter comes to this court on a petition by the Chamber of Commerce of the United States of America (the Chamber), for and on behalf of its member Boise Cascade Corp. (Boise Cascade), a petition by Summit Valley Industries, Inc. (Summit), and a petition by the Union. The Board is seeking enforcement of its order. The court ordered consolidation of these matters.

I.

Many years of peaceful collective bargaining agreements between the Union and the Silver Bow Employers Association in Butte, Montana, were disrupted in 1969 by the introduction of modular houses into the building construction market.

These modular houses were viewed with alarm by the Union and the local Building Trades Council because their use potentially reduced the amount of carpentry work needed at new home sites. When negotiations for a new collective bargaining agreement commenced in 1971 between the Union and Silver Bow Employers Association, the Union demanded a broad work preservation clause. No agreement could be reached initially and a three-month strike ensued. A limited

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[2] 29 U.S.C. § 158(b)(4)(B) and § 158(b)(4)(D).

[3] 29 U.S.C. § 151 *et seq.* (the Act).

work preservation clause, Article XXII, was eventually agreed upon,[4] bringing the strike to an end.

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[4]

ARTICLE XXII

CONTRACTING OR SUB-CONTRACTING OR WORK TO BE DONE AT THE SITE OF CONSTRUCTION

SECTION 1. Application. The Employers are in the construction industry and both parties have elected to come under the proviso applicable to the construction industry contained in Title 29, Section 158(e) of the United States Code as amended.

SECTION 2. Scope of the Foregoing. Sections 1 and 3 of this Article relates to contracting or sub-contracting and work to be done at the site of the construction, alteration or repair of a building structure or other work.

SECTION 3. (A) All of the following work shall be performed at the site of construction, alteration or repairing of a building structure or other work and shall not be sub-contracted off the jobsite, unless said work is done, at the Employer's shop.

(1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.

(2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.

(3) The installation of all exterior trim on the structure, or in the alternative, all interior trim on the structure.

(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal, or composition material.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops. . . .

(9) The placing and fastening of all components of the structure upon the foundation.

(B) Nothing herein shall apply to any structures in the following situations:

(1) (Omitted).

(Footnote continued on next page.)

Subsequently, Silver Bow Employers Association filed charges that Article XXII violated Section 8(e) and that the Union violated Section 8(b)(4)(A) by striking to obtain it. The Board rejected these arguments, finding that Article XXII was a valid work preservation clause. *United Brotherhood of Carpenters, Local #112 (Silver Bow Employers Assn.)*, 200 NLRB 205 (1972).

After the validity of the clause had been established, the Union attempted to enforce the clause. It is the method of enforcement and the parties at whom the enforcement was directed that create the basic issues here.

A Butte contractor, Jovick Construction Co., a signatory of the Union agreement, contracted to build a house foundation and garage. These were for a Summit modular house. The Union's business agent, Cadigan, went to the site and ordered a worker off the job because the work was for a modular house. Jovick, a member of the Union, continued to work on the house. The Union brought charges against him, suggesting the maximum penalty.

Cadigan similarly approached Union members working for Perusich Construction, ordering them not to work on a Boise Cascade modular house.

Lutey Construction Co., another Butte contractor, was working on foundations for a Boise Cascade homesite. Lutey

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(Footnote continued from preceding page.)

(2) When the construction work done by the Employer at the site of a pre-assembled or pre-built single family dwelling unit consists of building independent structures such as garages or other structures that are not part of the unit itself.

(C) No Employer shall be discriminated against, nor be adversely affected by the Union, for accepting and completing any sub-contracted work that conforms to Paragraph A of this Article.

(D) Nothing herein shall be construed to restrict work by carpenters or contractors when pre-fabricated or pre-built components of construction not listed in Paragraph A are utilized, installed or assembled at the site of construction.

had been hired by Jack McLeod & Associates (McLeod), the Boise Cascade home franchise dealer in Butte. Cadigan ordered William Lutey, a carpenter employee, off the job, telling him Union members were not to work on modular houses. Lutey then left the job.

Other incidents involved Union pressure against parties who were not signatories to the collective bargaining agreement. Boise Cascade had contracted with Reed Lemmons, a house mover, to deliver houses to the Butte area. Cadigan visited a site where Lemmons and his crew were placing a house on its foundation. Cadigan was told that Lemmons' employees were not unionized. Cadigan threatened to picket the site if they did not leave, because he said placing the houses on the foundations was work belonging to the carpenters' union.

Cadigan also confronted McLeod about the placing of modular houses on foundations. Cadigan made it clear to McLeod that (1) placing the houses on foundations was work belonging to the carpenters, (2) that no houses were to come into Butte unless partially finished as provided in Article XXII, and (3) that if McLeod was becoming a contractor, he would have to sign the Union contract or the Union would move to bar Boise Cascade houses from Butte.

Boise Cascade sent two employees, Garry and Pratt, to Butte from Pocatello, Idaho, to finish a Boise Cascade modular house. The two were members of the carpenters' local in Pocatello. Before starting work, they went to Cadigan to secure a clearance to work in the Union's jurisdiction. Cadigan refused to allow Garry and Pratt to work on the Boise Cascade house because Boise Cascade was not a signatory to the Union's agreement. Cadigan also threatened to picket if the men did start to work. The men then informed McLeod, the Boise Cascade franchise dealer, that they would not be allowed to work and returned to Pocatello.

Summit had a contract with its employees through the International Brotherhood of Teamsters, Local No. 2, Butte, Montana (Teamsters). After the Union pressured Jovick away from finishing Summit houses, Summit's employees began to do the finishing work. As a result, the Union started to picket a Summit model home informing passers-by that carpenters had not been employed in constructing the building.[5]

Thereafter, Summit filed charges with the Board alleging that the Union was violating Section 8(b)(4)(D) by attempting to force Summit to reassign modular home work from the Teamsters to the Union. Pursuant to Section 10(k), the Board made a work jurisdiction dispute determination against the Union.[6]

As a result of that award to the Teamsters, the Union advised the Board that it would not require Summit to assign work in violation of its Teamsters contract, but added:

> That the Union affirms that it has the right, and will under some circumstances use its rights under the National Labor Relations Act, to truthfully advise the public, whether by picketing or other publicity that the Summit Valley Industries, Inc., does not employ members of, or have a contract with the United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, if, in fact, such is the truth and such picketing or publicity is for the sole purpose of advising the public of the situation.

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[5] The picket's sign read:

NOTICE
TO THE PUBLIC
THIS EMPLOYER *DID NOT*
EMPLOY MEMBERS OF
CARPENTERS UNION IN THE
WORK PERFORMED *ON THIS*
BUILDING. LOCAL 112
CARPENTERS UNION
AFL-CIO

[6] *United Brotherhood of Carpenters, etc. (Summit Valley Industries, Inc.)*, 202 NLRB 974 (1973).

The Board found that these actions of the Union violated Section 8(b)(4)(B) and 8(b)(4)(D) of the Act. Specifically, it was found that the Union violated Sections 8(b)(4)(i) and (ii)(B) when it instructed employees of Jovick, Perusich and Lutey to leave their jobsites. This constituted inducement to refuse to perform services with the object of exerting pressure against the modular house manufacturers. The Board further found that the Union violated Section 8(b)(4)(i) and (ii)(B) by encouraging or inducing Garry and Pratt, and Summit employees to cease working on modular houses and by threatening Lemmons, McLeod, Boise Cascade and Summit in order to cause the manufacturers to conform to Article XXII or cease bringing modular houses into Butte. In addition, the Board determined that the Union violated Section 8(b)(4)(D) by failing to comply with the Board's Section 10(k) award by refusing to unequivocally waive picketing to effect reassignment of Summit factory and jobsite work from Teamster-represented employees.

The Board ordered the Union to cease and desist the unfair methods of enforcing Article XXII. It was also ordered to comply with the Board's Section 10(k) work award. In addition, the union was required to rescind all disciplinary actions, return fines and reinstate members where the Union members were penalized for working in violation of Article XXII.[7]

II.

The first issue that needs to be addressed involves the validity of Article XXII. The Chamber of Commerce, in its brief, argues that the Union sought Article XXII for an improper purpose violating Section 8(e).[8]

[7] The Board's decision is reported at 217 NLRB 902 (1975).
[8] 29 U.S.C. § 158(e).

Section 8(e) makes it an unfair labor practice for unions and employers to enter into contracts whereby the employer ceases or agrees to cease doing business with any other person. But, under *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612, 635 (1967) (*National Woodwork*), section 8(e) does not prohibit agreements made for primary purposes. This includes the purpose of preserving work traditionally done by the union.

The Board here found no Section 8(e) violation. Such a clause can be valid despite the fact some of the union's enforcement attempts violate Section 8(b)(4)(B). *National Woodwork, supra.* Article XXII was also adjudged a valid work preservation clause in *United Brotherhood of Carpenters, Local No. 112,* 200 NLRB 205 (1972). And, the Chamber conceded that on its face, Article XXII was lawful.

The Chamber argues though that the improper enforcement practices that followed prove that from its inception, Article XXII had an unlawful secondary purpose. Such an argument is foreclosed by the *National Woodwork* decision. In that case, the union tried to enforce a work preservation clause against three subcontractors who were not in a position to assign the work and one contractor who could. The enforcement attempts against the three subcontractors were found to be improper secondary activity. But, the enforcement against the general contractor, who had control over the work covered by the work preservation clause, was proper. This shows that just because the union miscalculates the circumstances under which it can act to enforce the clause, it does not render the clause invalid.

The Board's findings are supported by sufficient evidence that in contracting for the clause, the Union's purpose was to preserve work traditionally done by the Union. This being a proper primary purpose, Article XXII does not violate Section 8(e).

III.

Determination of whether the Union violated Section 8(b)(4)(B) and (D) of the Act is controlled by *National Labor Relations Board* v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 U.S. 507 (1977) (*Pipefitters*). That case reaffirmed the Board's use of the right-to-control test in disputes over enforcement of work preservation clauses. The right-to-control doctrine was used by the Board here and was an issue on appeal.

Simply stated, the right-to-control test says that a union violates Section 8(b)(4)(B) when it coerces an employer to assign work to the union when that employer has no control over the work. As pointed out by the Court in *Pipefitters*, 429 U.S. at 523, n.11, the right-to-control test is not a *per se* test and other surrounding circumstances are taken into consideration. *See, e.g., Local Union No. 438, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO* v. *National Labor Relations Board*, 201 NLRB 59 (1973), *enfd. sub nom., George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (4th Cir. 1974).

Under this test, the violations of Section 8(b)(4)(B) seem clear. Section 8(b)(4)(i)(B) makes it unlawful for a union to "induce or encourage any individual employed by any person" where "an object" of that conduct is to cause an unlawful secondary boycott of another person. Similarly, Section 8(b)(4)(ii)(B) forbids a union from threatening, coercing or restraining any person for a secondary objective.

This improper coercion and inducement is found in the Union's orders for Jovick, Perusich and Lutey to stop work on modular homes and homesites. These parties were subcontractors on projects under which they had no control over the

work assigned. This point, plus the other circumstances involved, justified the Board's decision that the Union's conduct was seeking to improperly pressure Summit and Boise Cascade. This would be improper secondary conduct.

Union pressure on Boise Cascade's subcontractor Reed Lemmons and franchiser McLeod also was seen by the Board to have an improper secondary motive, violating Section 8(b)(4)(ii)(B).

Since the Board used the proper test as originally stated in *National Woodwork, supra*, and reaffirmed in *Pipefitters, supra*, the order of the Board as to these violations will be affirmed.[9]

IV.

Section 8(b)(4)(D) forbids a union from inducing or encouraging anyone to strike in order to force any employer "to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization. . . ." Unlike Section 8(b)(4)(B), this section applies to both primary and secondary conduct. *Local 450, International Union of Operating Engineers, AFL-CIO* v. *Elliott*, 256 F.2d 630, 635 (5th Cir. 1958).

The Union in this case ordered its members to stop doing work on Summit houses until Summit, which had not signed the Union agreement, complied with Article XXII. In addition, the Union placed a picket at the site of a Summit model home.

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[9] The Ninth Circuit has endorsed the use of right-to-control as part of the Board's analysis in this type of case. *Associated General Contractors of California* v. *NLRB*, 514 F.2d 433 (9th Cir. 1975). That decision is cited with approval by the Supreme Court in *Pipefitters*, 429 U.S. at 527 n.15. To the extent *Western Monolithics Concrete Products* v. *NLRB*, 446 F.2d 522 (9th Cir. 1971) is inconsistent, it cannot stand; particularly after resolution of the conflicts among the circuits in *Pipefitters*.

Summit already had an agreement with the Teamsters for inplant work and site work on its houses. To comply with the Union's demands, Summit would have had to reassign a considerable amount of work to the Union.

To resolve this conflict, the Board entered a Section 10(k) award giving the work to the Teamsters. But, after the award, the Union threatened to continue picketing the site to enforce the claim rejected in the Section 10(k) award. In its initial acts against Summit and its further threats against the manufacturers, the Union clearly violated Section 8(b)(4)(D) as found by the Board.

V.

During the Union action against the influx of modular houses, the Union requested the help of the Southwest Building Trades Council of Montana. This Council is composed of about 15 unions directly engaged in the construction industry.

One of the concerns expressed by the Council was the problem of Teamsters doing intra-jobsite driving. This driving traditionally goes to the craft unions working full-time at the site.

In response, the Council prepared the following letter:

NOTICE TO ALL CONTRACTORS:

Please be informed the Southwest Building Trades Council has taken action that its membership will not work on construction projects with personnel whose International Union is not affiliated both locally and internationally with Building Trades Council, AFL-CIO.

This action pertains to onsite construction and will be in effect commencing October 16, 1972.

On the attached sheet are the unions who are affiliated both nationally and locally with the Building and Construction Trades Department, AFL-CIO.

The Teamsters were absent from the list of affiliated unions.

The letter went to four general contractors not engaged in residential construction.

As a result of the letter, the Chamber filed Section 8(b)(4)(B) charges against the Council.

The Board agreed with the Administrative Law Judge's ruling that since the letter went to no one involved directly in the modular house dispute, there was no improper pressure being placed on the contractors.

The issue on appeal where the Board finds that conduct does not violate the Act is whether the Board had a rational basis for its decision. *International Ladies' Garment Workers* v. *National Labor Relations Board* (McLaughlin Mfg. Corp.), 463 F.2d 907, 919 (D.C. Cir. 1972). It is well settled that a reviewing court should not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488 (1951); *National Labor Relations Board* v. *Holly Bra of California,* 405 F.2d 870, 872 (9th Cir. 1969).

From the context in which the letter arose and the contractors to whom it was sent, it cannot be said that the Board had no rational basis to support its conclusion that all petitions for review should be denied, and the Board's order should be affirmed and enforced. It is so ORDERED.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 112, AFL-CIO AND ITS AGENT, SOUTHWEST BUILDING TRADES COUNCIL OF MONTANA, AFL-CIO[1]

and — Cases 19—CC—588 and 19—CD—212

SUMMIT VALLEY INDUSTRIES, INC.

and — Case 19—CC—591

JACK MCLEOD & ASSOCIATES, INC.

and — Cases 19—CC—604, 19—CC—604-2, and 19—CE—21

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FOR AND ON BEHALF OF ITS MEMBER BOISE CASCADE CORPORATION AND ALL OTHER SIMILARLY SITUATED MEMBERS[2]

DECISION AND ORDER

On May 9, 1974, Administrative Law Judge Louis S. Penfield issued the attached Decision in this proceeding. Thereafter, exceptions and supporting briefs were filed by Respondent Carpenters, Respondent Council, Summit Valley

[1] Hereinafter referred to as Respondent Carpenters and Respondent Council, respectively.

[2] Hereinafter referred to as the Chamber of Commerce.

Industries, Inc., Jack McLeod & Associates, Inc., The Chamber of Commerce, and the General Counsel. The Chamber of Commerce also filed a supplemental brief and Air Conditioning and Refrigeration Institute, *et al.*,[3] filed an *amicus curiae* brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[4] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law

[3] American Boiler Manufacturers Association, Air Moving and Conditioning Association Inc., Architectural Woodwork Institute, American Consulting Engineers Council, National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association.

[4] The Chamber of Commerce has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

Respondent Carpenters motion requesting the Board to reject the Chamber of Commerce's supplemental brief is hereby denied as lacking in merit.

[5] We do not share our dissenting colleague's evaluation of the record here as establishing that a decision to purchase a modular home is "never made or even participated in" by any employer of Respondent's members, and that art. XXII "could have no other purpose" except to bar finished modular homes completely from the Butte market. We are aware of nothing in the record which proves, for example, that a carpentry contractor could or might never decide to purchase and erect a modular home for resale on his own account.

Moreover, contrary to our dissenting colleague, in determining the validity of a clause under Sec. 8(e), the Board has never considered extrinsic evidence as to the manner in which the clause has been subsequently enforced where as here the clause is clearly lawful on its face.

Judge and hereby orders that Respondent United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, Butte, Montana, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. May 12, 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KENNEDY, concurring in part and dissenting in part:

I concur in my colleagues' findings that Respondent Carpenters have engaged in unfair labor practices in violation of Section 8(b)(4)(i), (ii)(B) and (D) of the Act. I disagree with their dismissal of the 8(e) and 8(b)(4)(i) and (ii)(A) complaint allegations against Respondent Carpenters.[6]

The Administrative Law Judge found, *inter alia,* that certain actions taken by the Union to enforce the provisions of article XXII of its collective-bargaining agreements with Butte,

[6] Also unlike my colleagues, I would not affirm the Administrative Law Judge's rulings wherein he rejected certain expert testimony and exhibits proffered by Charging Party Chamber of Commerce which dealt with economic factors relating to the home construction industry on a national basis.

Montana, building contractors,[7] threatened, coerced, and restrained contractors Jovick, Perusich, and Lutey—and unlawfully induced and encouraged their employees—with an object of forcing or requiring them to cease handling and otherwise performing work upon fully finished modular homes manufactured by Summit Valley Industries, Inc., and Boise Cascade Corporation. I agree with this finding. However, I would further find that the Union violated Section 8(e) of the Act by "entering into" article XXII, and violated Section 8(b)(4)(i) and (ii)(A) by threatening, coercing, and restraining the aforementioned contractors with the object of forcing or requiring them to "enter into" article XXII.

Fully finished modular homes of the type manufactured by Summit and Boise come from their factories to building sites in the Butte area as substantially finished products with most of the work that carpenters normally perform on conventional stick-built houses already completed. However, some carpentry work is still required at the sites—for construction of the foundations, "stitching work" on the modular units, hanging of some inside doors, and building of stoops, stairs, and railings. To perform this work, local building contractors are engaged by either the home buyer or Boise's franchised dealer in Butte, Jack McLeod & Associates. With respect to the modular homes directly involved herein, the foundation and finishing work was given to contractors Jovick, Perusich, and Lutey, all of whom employed members of Respondent Carpenters and were bound to contracts containing article XXII.[8]

[7] Art. XXII is purported by the Union to be a work preservation agreement. In pertinent part, it sets forth specific aspects of carpentry work which signatory contractors must have performed only at construction sites. Most of the work so specified is performed on fully finished modular homes at the factory where they are manufactured. The full text of art. XXII appears in the attached Decision of the Administrative Law Judge.

[8] All, or almost all, Butte area contractors performing carpentry work are bound to art. XXII, either through their membership in the

(Footnote continued on next page.)

When the contractors commenced their work on the modular homes or on the foundations therefor, the Union asserted that they were violating article XXII and proceeded to apply pressures to both the contractors and the contractors' employees which effectively terminated further work on modular homes in the Butte area. The Administrative Law Judge, relying on the reasoning set forth both by the Board and the court in the *Koch* case,[9] found that the pressured contractors were neutrals as they were incapable of acceding to the Union's work-assignment demands and, therefore, concluded that the actions taken against them and their employees had a secondary objective and were violative of Section 8(b)(4)(i) and (ii)(B).

However, the Administrative Law Judge then proceeded to hold that article XXII, itself, did not have a proscribed object and, accordingly, the conduct of Respondent Carpenters in "entering into" it—and pressuring contractors to "enter into" it—was not violative of the Act. In reaching this conclusion, the Administrative Law Judge relied on his preliminary finding that when initiating, entering into, and maintaining article XXII the Union was seeking only to preserve work historically and traditionally performed by its carpenter members against the advent of modular housing in the Butte area.

In so finding, the Administrative Law Judge relied on the decision of a panel of this Board in *United Brotherhood of Carpenters & Joiners of America, Local #112, AFL-CIO (Silver*

(Footnote continued from preceding page.)

Silver Bow Employers' Association or the Butte Contractors' Association—which organizations jointly negotiated identical contracts with Respondent Carpenters—or by execution of individual compliance agreements. Contractors Perusich and Lutey are members of the Butte Contractors' Association, while Jovick was an individual signatory.

[9] *Local Union No. 438, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (George Koch Sons, Inc.)*, 201 NLRB 59, enfd. *sub nom. George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (C.A. 4, 1973).

Bow Employers' Association), 200 NLRB 205 (1972), in which I did not participate. In that decision the Board dismissed the allegation that the initial entry into article XXII violated Section 8(e). That decision is not persuasive in view of the evidence of unlawful intent revealed by the subsequent enforcement efforts explicated on the record here.[10] The Board has clearly held that postentry conduct does reveal initial secondary purpose in the demand for and entry into such an agreement. *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Independent Owner-Operators, Inc.)*, 181 NLRB 515 (1970). See *Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Merle Riphagen)*, 212 NLRB No. 5 (1974). It is significant that Respondent Carpenters conceived article XXII as a means of avoiding the Board's earlier decision that its actions against the performance of work on these modular houses were unlawful. *Southwest Building Trades Council of Montana (John A. Bender)*, 188 NLRB 224 (1971). Therefore, in my view, the Administrative Law Judge's analysis is inadequate and should not be adopted. The General Counsel is correct on the facts and the law in his assertion that the extrinsic evidence adduced on this record proves that Respondent Carpenters understood and intended article XXII to encompass secondary objectives at the time it was entered into.

[10] The scope and meaning of art. XXII can be ascertained only from an examination of the circumstances of the industry and the labor relations of the parties who negotiated the contract. Without that context, the clause *per se* is merely a list of job assignments which does not on its face answer the questions which the Supreme Court has said must be answered to determine the legality of the contract. *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967). Whether the clause meets the standard of legitimate work preservation or is designed to reach elsewhere is a question that can only be answered by an analysis of its context which includes the evidence of its enforcement history.

When evaluated in the context of record evidence pertaining to the home construction industry in Butte and the conduct of Respondent Carpenters, it is clear that the sole motivation[11] for initiating, "entering into,"[12] maintaining, and enforcing article XXII was to completely bar fully finished modular homes from the Butte housing market. It could have no other purpose, as the Union conceded that it had experienced no difficulties with the contractors relating to the use of prefabricated or other off-site constructed components in the conventional stick-built construction.[13] Indeed, as the Board found in *United Brotherhood of Carpenters & Joiners of America Local 112, AFL-CIO (Summit Valley Industries, Inc.)*, 202 NLRB 974 (1973), Respondent Carpenters' pressure against Summit Valley would cease if Respondent achieved jurisdiction of the in-plant work of assembling these modular houses, which work was already being done by employees represented by another labor organization. In that proceeding, Respondent conceded that it was attempting to apply article XXII. Respondent's object is to acquire work being performed by other

[11] My colleagues' reliance on Respondent's self-serving testimony that it conceived of and enforced art. XXII in "good faith" is ill founded. The law will not recognize such disclaimers, but rather presumes that one intends the foreseeable consequences of misconduct. See my dissent in *Los Angeles Building and Construction Trades Council (B & J Instrument Company*, 214 NLRB No. 86 (1974).

[12] The actual execution of the contracts containing art. XXII predated the Act's 10(b) period herein. But, as the Administrative Law Judge correctly found, a contract may be viewed—at least for 10(b) purposes—as reaffirmed or "reentered into" when its terms are acquiesced in or enforced by the parties. Here, within the 10(b) period, the Union applied enforcement pressure, the employing contractors acquiesced, and such acquiescence constituted a new "entering into."

[13] The testimony of James Cadigan, Respondent Carpenters business agent, confirms that—except for modular homes—the Union had no problems with its contractors concerning the preservation of on-site construction jobs.

employees not represented by it. Such an object is secondary and violative of Section 8(e). *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612.

Further, as the decision to purchase a fully finished modular home is made by the home buyer or, in certain cases, by the modular home dealer—and is never made, or even participated in, by contractors employing the Union's members—Respondent Carpenters knew, or should reasonably have known, that article XXII would be enforced exclusively in situations where the signatory contractors would be unoffending neutrals and only secondary consequences would flow therefrom.

With regard to this factor, the Circuit Court of Appeals for the Ninth Circuit recently observed as follows:

> Whether an agreement or its maintenance constitutes a secondary boycott must be determined by reference to "all the surrounding circumstances." *National Woodwork, supra* at 644. An important factor in this determination is the "right-to-control" test which provides that "if an employer is not legally empowered to meet his employees' demand, then they cannot lawfully strike him for his failure to accede." *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323, 326 (4th Cir. 1973).
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> * * * * *
>
> [The Union] argues that its objective here was work preservation and that *National Woodwork* authorizes any union activity with that objective. We believe *National Woodwork* must be limited by the right-to-control doctrine. A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign. When it is applied to work beyond the

employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective.[14]

Accordingly, as the signatory building contractors herein were merely secondary employers with no power to alter the nature of the work performed on the modular homes, it becomes clear that the Union's true objective was, through coercion of the contractors, to put pressure on modular home buyers and dealers to cease doing business with Summit and Boise and, thereby, to pressure Summit and Boise to either alter the nature of their products or cease manufacturing them.

Therefore, as the record evidence shows that article XXII was, and is, necessarily aimed at contractors who cannot control the type of housing on which they are asked to work, it necessarily becomes secondary and unlawful under Section 8(e), and the conduct engaged in to obtain the clause and compliance therewith (a new "entering into") did and does violate Section 8(b)(4)(i) and (ii)(A).

Wholly apart from considerations concerning the contractors' known inability to secure the disputed work for the Union's members, I would also find a violation of Section 8(e) on the ground that the work the Union sought to preserve by "entering into" article XXII is not work which its members have historically and traditionally performed. For, I regard fully finished modular homes as being technological innovations. Their production on an assembly-line operation in an industrial plant is significantly different in nature from conventional craft operation "stick-built" homes. From this, I conclude that the in-factory work performed on them cannot be considered in the same category as the jobsite work which carpenters have historically and traditionally performed on

[14] *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 88 LRRM 3542, 3544, 3545 (C.A. 9, 1975), reversing 207 NLRB No. 58 (1973).

conventional housing.[15] Moreover, from the record evidence herein, it appears that the relationship between successful enforcement of article XXII and the securing of employment opportunities for jobsite carpenters is, at best, remote.[16]

Therefore, I conclude that the objective of article XXII was to acquire, rather than preserve, work for the employees represented by Respondent Carpenters. Accordingly, I would, on this additional basis, find that article XXII, its entry into, maintenance, and enforcement, is violative of Sections 8(e) and 8(b)(4)(i) and (ii)(A) of the Act.

Dated, Washington, D.C.

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

[15] See my dissents in *Southern California Pipe Trades District Council No. 16 of the United Association (Associated General Contractors of California)*, 207 NLRB No. 58 (1973); *Southern California Pipe Trades District Council No. 16 (Kimstock Division, Tridair Industries)*, 207 NLRB No. 59 (1973).

[16] The record establishes that there is a substantial price differential between fully finished modular homes and conventional stick-built housing. Testimony indicated that the former sell in the $18,000—$25,000 price range, while the latter are almost always priced in excess of $25,000. While modular houses are generally smaller in area than the conventional ones, the evidence also shows that, even in terms of cost per square foot, the modular houses maintain a cost advantage to the buyer. As a result of their differing price ranges, it appears that the conventional homes (on which carpenters have traditionally performed art. XXII work) and modular homes do not directly compete with each other in the same housing market.

APPENDIX
NOTICE TO EMPLOYEES AND MEMBERS
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT induce or encourage any employee to refuse to work on, handle, or transport any modular house, or threaten or coerce any person, including Butte area contractors, or any other employer engaged in some aspect of constructing, transporting, or handling modular houses, where in either case an object of such pressures is to force or require the Butte area contractors, or any other person, to cease working on a modular house at a jobsite, either altogether, or unless and until such house be brought to the jobsite in a condition which conforms to the requirements of article XXII of the contract; or where an object is to force or require manufacturers of modular houses to cease bringing such houses into the Butte area altogether, or to change their mode of operation so that such houses are brought to Butte area jobsites in a condition that conforms to article XXII of the contract.

WE WILL comply with the Board's Direction and Determination of Dispute on the work assignment issue, and will not picket or bring economic pressure against Summit Valley, or any other person, where an object is to force or require Summit Valley to assign carpentry work, whether in its plant or at a jobsite, to employees who are members of our union rather than to employees who are members of Teamsters Union Local No. 2.

WE WILL rescind any fines assessed, refund any fines collected, and restore membership status in any case where our members have been penalized for engaging in conduct deemed by us to have been violative of article XXII of the existing contract.

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA, LOCAL 112,
AFL-CIO (Labor Organization)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Republic Building, 1511 Third Avenue, Seattle, Washington 98101, Telephone 206-442-4532.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 112, AFL-CIO AND ITS AGENT, SOUTHWEST BUILDING TRADES COUNCIL OF MONTANA, AFL-CIO, Respondents	Case No. 19-CC-588
and	
SUMMIT VALLEY INDUSTRIES, INC.	
and	Case No. 19-CC-591
JACK MCLEOD & ASSOCIATES, INC.	
and	Case No. 19-CC-604 Case No. 19-CC-604-2
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FOR AND ON BEHALF OF ITS MEMBER BOISE CASCADE CORPORATION AND ALL OTHER SIMILARLY SITUATED MEMBERS	Case No. 19-CE-21 Case No. 19-CD-212

James M. Kennedy, Esq., and *Leslie S. Waite, Esq.* for the General Counsel.
Poore, McKenzie and Roth, by *Donald C. Robinson, Esq.*, of Butte, Montana, for Charging Party Summit Valley.
McCaffrey and Peterson by *John L. Peterson, Esq.*, of Butte, Montana, for Charging Party McLeod.
Lederer, Fox and Grove, by *S. Richard Pincus, Esq.* and *Lawrence M. Cohen, Esq.*, of Chicago, Ill., for Charging Party The Chamber.
Gerard C. Smetana, Esq., of Chicago, Ill., for Charging Party The Chamber.
Holland, Holland & Haxby, by *Dave Holland, Esq.*, of Butte, Montana, for Respondent Carpenters.
Bailey, Doblie, Ceniceros and Bruun, by *Paul T. Bailey, Esq.*, and *Gerald C. Doblie, Esq.*, of Portland, Oregon, for Respondent Carpenters.
Benjamin W. Hilley, Esq., and *Emily Loring* of Great Falls, Montana, for Respondent Council.

DECISION

Statement of the Case

LOUIS S. PENFIELD, Administrative Law Judge: This consolidated proceeding was heard before me in Butte, Montana, on 15 hearing dates occuring between June 5, 1973 and October 26, 1973. The consolidated complaint was issued on May 11, 1973. The charges in Cases Nos. 19-CC-588 and 19-CD-212 were filed by Summit Valley Industries, Inc., herein called Summit Valley, on October 12, 1972. The charge in Case No. 19-CC-591 was filed on October 19, 1972 by Jack McLeod & Associates, Inc., herein called McLeod. The charges in Cases Nos. 19-CC-604 and 19-CE-21 were filed on January 5, 1973, and the charge in 19-CC-604-2 was filed on January 12, 1973. Each of the latter charges was filed by the Chamber of Commerce of the United States of America, herein called the Chamber. Copies of each of the charges were duly served upon the parties. The consolidated complaint alleges that Respondent United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, herein called the Carpenters, engaged in various unfair labor practices in violation of Sections 8(b)(4)(i)(ii)(A) and (B), 8(b)(4)(i)(ii)(D) and 8(e) of the Act.

While the hearing was in recess, but after three days thereof had been completed, the Chamber amended its charge in Case No. 19-CC-604 to join Southwest Building Trades Council, herein called the Council, as an agent of the Carpenters with regard to certain unfair labor practices. Thereafter, on July 20, 1973 the General Counsel moved to amend the complaint to name the Council as agent for the Carpenters and a party respondent. When the hearing reconvened on July 24 the motion to amend was denied by the undersigned after hearing argument on the record. This ruling was appealed to the Board by the General Counsel and the Chamber. On July 27 the Board reversed my denial of the motion to amend and

directed that I take appropriate action. Thereafter, the undersigned ordered that the complaint be amended and that the Council be given time to answer, and otherwise given the time and opportunity to review the record already made. The hearing was recessed on July 27 and resumed on September 11, at which time the Council appeared by its attorney and remained and participated during the balance of the hearing.

All parties were given full opportunity to participate in the hearing, and after the close thereof, the General Counsel, the Charging Parties, and both of the Respondents filed briefs.

Upon the entire record in this consolidated proceeding, and upon my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. JURISDICTION

Jurisdiction is not contested. This proceeding, involving as it does alleged violations of Section 8(b)(4), includes various employers or groups of employers involved in the dispute who may be characterized as primary or secondary employers within the meaning of the statute. Summit Valley, a Butte manufacturer of modular houses, purchases materials and supplies from sources outside the State of Montana valued in excess of $50,000. Boise Cascade, another manufacturer of modular houses, has its plant in Pocatello, Idaho and directly ships houses manufactured there to purchasers in states other than Idaho which are valued in excess of $50,000. Silver Bow Contractors' Association and Butte Contractors' Association represent various employers engaged in the general contracting business in Butte, Montana. In the aggregate, the business operations of such contractors realize a gross income exceeding $500,000 and they purchase goods and supplies originating outside the State of Montana, valued in excess of $50,000.

Under the circumstances it is obvious that employers directly involved are engaged in businesses which affect commerce within the meaning of the Act, and that under existing Board jurisdictional standards assertion of jurisdiction is warranted, and I so find.

II. The Labor Organizations Involved

Respondent Carpenters and Respondent Council are each, and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The entire controversy in this lengthy and involved proceeding centers on the lawful or unlawful nature of a so-called work preservation clause found in a contract between Respondent Carpenters and certain building contractors who function in Butte, Montana and the adjacent area. It is the contention of the General Counsel and the Charging Parties that this clause was conceived for an unlawful secondary "cease doing business" object, and that it was entered into and enforced by unlawful means. The legal responsibility of Respondent Council for aiding Respondent Carpenters in its unlawful pursuits, and the responsibility of Respondent Carpenters itself for alleged unlawful work assignment pressures represent subsidiary, but not unimportant, issues.

Respondent Carpenters contend the contract clause to be concerned solely with lawful work preservation within the rationale set forth by the United States Supreme Court in *National Woodwork Manufacturers Association,* 386 U.S. 612, 64 LRRM 2801, herein called *National Woodwork.* The General Counsel and the Charging Parties dispute Respondent Carpenters' interpretation of *National Woodwork* on several

counts, claiming, among other things, that the Carpenters' enforcement efforts are unlawful within the rationale of the Board in *Plumbers and Pipefitters Local No. 438 (George Koch Sons, Inc.),* 201 NLRB No. 7, herein called *Koch.* Subsequent to the close of this hearing *Koch* was affirmed in *George Koch & Sons, Inc.* v. *N.L.R.B.,* 84 LRRM 2957 (C.A. 4, December, 1973).

The disputed clause came into being in 1971 following a strike in which it had been the primary issue. During the strike efforts to obtain such a work preservation clause were charged to be unlawful within the meaning of Section 8(b)(4)(A) and Section 8(e). After litigation these charges were dismissed by the Board in *Carpenters Local 112, (Silver Bow Employers Association),* 200 NLRB No. 42, herein called the *Silver Bow* case. The lawful nature of the clause itself, however, is again attacked in the instant proceeding along with the lawful character of the means used to bring about its enforcement.

The advent of modular houses into the Butte area brought about the Carpenters' demand for the clause. We will first define the term "modular house" and contrast its meaning with that of the more conventional type of house. Then we will view the background against which the disputed clause came into being and consider the means used to enforce it. Finally, in addition to treating with the subsidiary issues, we will evaluate the alleged unlawful nature of the object for which the clause was pursued or enforced.

A. Modular Houses, Stickbuilt Houses, And Carpenters' Work

Respondent Carpenters represents journeymen and apprentice carpenters in the Butte area who work on the construction of dwellings in commercial or industrial buildings. Carpenters normally work for area contractors and perform their work either at a building site or in the shops of the contractors. For many years, collective-bargaining agreements

between Butte contractors and Respondent Carpenters have controlled the working conditions.

The traditional so-called stickbuilt house involves the work of various crafts, each represented by a different union. For the most part, the differing skills and the jurisdictional lines between the crafts are well defined. A stickbuilt house normally starts with the digging of a foundation; preliminary piping follows; footings and concrete walls are then put in; a frame is built; piping and basic wiring go in; outside siding and roofing are put on; and finally there will be inside finishing and the installation of cabinets. Materials used by the different crafts will be delivered to the jobsite, some in a substantially prefabricated state. Onsite work, however, by all crafts follows a more or less well-defined sequence toward completion, with steady work performance depending on the availability of workers in each craft as its work is needed. Reasonably good weather conditions are required for most jobsite work to progress. In the case of the Butte carpenters, many innovations have been accepted in the past 25 years. These include the use of power tools, precut lumber, prefabricated cabinets, and many other items. It is estimated that as a result of such innovations two carpenters at the present time, are able to do the same amount of work which formerly required the use of five carpenters.

Modular houses are best described as factory built. They are a fairly recent development in the house building industry. This proceeding directly involves two modular house manufacturers, Summit Valley Industries, Inc. and Boise Cascade Corporation. Summit Valley, the smaller of the two enterprises, is located in Butte. The far larger Boise Cascade factory is located in Pocatello, Idaho, some 250 miles from Butte, a location from which it serves a large area.

The construction process followed with a factory built house is similar at both enterprises. The houses are built

pursuant to a few well-standardized plans. The construction takes place indoors and follows what is essentially an assembly line process. Because of its fixed pattern, the work called for is frequently repetitive. This enables the manufacturer to staff the plant with job trained workers rather than having to call upon the journeymen and apprentice craftsmen that jobsite construction demands. In such a plant, full use will be made of overhead cranes and readily available power equipment of a diversified nature. This makes a substantial contribution toward an efficient operation and a steady flow of work. Normally, several houses will be on the production line at the same time. This will make it possible to move employees from one area to another, and make full use of their limited job trained skills. Since all work is done indoors, inclement weather does not result in work interruptions. Accordingly, employees working for modular house manufacturers have an opportunity for far steadier employment than comes to employees working at jobsites. The centralization of construction on all the houses also enables the manufacturers to keep substantial inventories of materials and take full advantage of lower costs which may come about through making large purchases.

Summit Valley produces only three different models of modular houses from which a buyer may choose. Each of these has a standard basic design but a variety of options are open to a buyer. Boise Cascade has some 35 different plans and a greater variety of options. A modular house will come from either factory as a finished product completely wired, completely plumbed, with all appliances installed, with the carpeting laid, and with the painting completed. It needs only to be transported to the building site, placed on a foundation, and to undergo what is called stitching together to become immediately habitable. The required stitching, however, involves a substantial amount of work. The stitching is absolutely essential for each modular house, and much of such work falls within the carpenter's craft. Larger houses are usually transported in

two halves which must be joined at the jobsite by a stitching process. In every case there also will be wires and plumbing to be connected, and usually the job will include the hanging of some inside doors, and the building of stoops, stairs or railings. A modular house, of course, must always be placed upon a foundation. This will have been constructed prior to delivery. The construction of foundations for modular or stickbuilt houses does not differ.

Modular houses are generally marketed to prospective purchasers, either by the manufacturer directly or through a dealer. Generally speaking, the purchaser chooses a model from an available plan, chooses the options he desires and makes an initial deposit. After this the house will be built at the plant. Upon its completion the manufacturer will receive the agreed upon price usually obtained by financing with a lending institution. The completed house will be transported to the building site by the manufacturer. Ordinarily the purchaser makes his own arrangements with the contractor to put in an appropriate foundation and do the needed stitching. Summit Valley markets the houses which it builds directly. At times material to this proceeding, Jack McLeod & Associates was the franchised dealer for the Boise Cascade houses sold in the Butte area.

From the foregoing, it is apparent that each type of dwelling is the product of a differing process. The building of a stickbuilt house is for the most part a continuing jobsite process involving the intermeshing of a number of crafts. These crafts, following a somewhat fixed sequence, assemble and construct the finished habitable dwelling from a variety of material delivered to the jobsite in a greater or lesser prefabricated state. The overall size, the floor plan and the variety of elaborations in a stickbuilt house are limited only by the money which the owner is prepared to spend. On the contrary, a factory built modular house is a standardized product. It is strictly limited as to size and pattern, with few variations in design or floor plan

available. The options relate principally to such matters as types of wiring, types of appliances to be installed, and differences in the paint or other decor. The size of a modular house is limited by the manufacturer's design, and such houses come only in a range between 1,000 and 1,800 square feet. It is conceded that the cost per square foot of a modular house is less than the cost per square foot of a stickbuilt house of comparable size and finish. Considerable testimony was received as to the relative cost of the two types of houses, but it became apparent that so many variables were involved that any definitive determination as to the precise range of the differential is not practical. Suffice it to say that the record establishes the differential to be substantial, and the comparable quality of the two types of houses sufficiently close that given similar sized houses, the lower priced modular house would have a marked competitive advantage. The record further shows there is a shortage of houses in the price bracket within which modular houses fall. Thus it is a fair assumption that the price advantage will frequently result in a modular house being chosen by a prospective purchaser, despite its standardized pattern.

As noted above, the manufacture of a modular house, unlike the erection of a stickbuilt house, does not require the use of skilled employees. Thus the employment pattern at the manufacturer's plants ignores craft lines, and the work force is comprised of job trained production and maintenance employees. Both Summit Valley and Boise Cascade employees are organized along industrial lines. At Summit Valley, Local No. 2 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Teamsters, represents the employees in a production and maintenance unit. The Teamsters' contract wage scale is substantially lower than that provided for the journeymen and apprentice carpenters found in the contract between Respondent Carpenters and the Butte Contractors. Absence of a

weather problem, however, makes plant employment possible on a more steady basis. A Local of United Brotherhood of Carpenters and Joiners of America represents the Boise Cascade workers in Pocatello, also on an industrial basis. Although the record does not disclose the wage scale it is a fair assumption that the pattern is substantially similar to that found at Summit Valley.

It is both traditional, and necessary, that in building a stickbuilt house, carpenters will do all needed woodwork on the foundation and basements, all woodframing, all interior and exterior siding, all shingling, and the installation of all the cabinets. When a modular house is taken to a jobsite only the foundation forms, the stitching, and some work on stairs, railings and doors remain to be done at the jobsite. All the interior and exterior woodwork will have been done at the factory. This necessarily means that there will be less jobsite work for carpenters in any given situation where the house is modular rather than stickbuilt.

B. The Background, the Strike and Article XXII

Respondent Carpenters and some fifty contractors in the Butte area who employ carpenters, have had a collective bargaining relationship for many years. Insofar as this record shows, prior to 1969, no serious problems relating to onsite construction work had arisen between these contracting parties.

In 1969, John A. Bender, a Butte realtor, became the franchised dealer for Interstate Homes, Inc. Interstate manufactured modular houses in a nonunion plant located in Salt Lake City, Utah. Houses that Bender sold to customers were to be shipped by Interstate to the Butte area and placed on appropriate foundations there. The foundation and the stitching work was to be done by contractors employed by Bender or his customers. When this was noted by Respondent Carpenters, Respondent Council and other construction unions, they brought pressures against the Butte contractors to prevent their doing the needed work to make the houses habitable. This resulted in 8(b)(4)(B) charges lodged against Respondent Carpenters, Respondent Council and the Laborers' Union. The issue was litigated and a Board decision was issued on January 29, 1971 in *Southwest Building Trades Council of Montana, et al. (John A. Bender)* 188 NLRB 224, herein called the *Bender* case. The Board found the conduct of all three labor organizations to be violative of Section 8(b)(4)(ii)(B) of the Act. An examination of the decision makes it apparent that the unions viewed with alarm the entry of prebuilt houses into the Butte area. Their objections were expressed both in terms of the nonunion manufacture of such houses, and fear of loss of jobs by local craftsmen should many of these prebuilt houses reach the area. It was the latter that appears to have been the primary concern of James Cadigan, then and still the Carpenters' business agent, for he is reported to have expressed himself by stating "Our dispute is protecting the work of our people." The Board found, however, that even a work preservation object would not insulate the unions from 8(b)(4) sanctions in the existing circumstances, because they were exerting their pressures on the wrong persons, and thus were using a proscribed means of enforcing even a lawful object. At the time of *Bender,* none of the unions had a contract containing a work preservation clause of any sort. Thus the contractors had neither a contractual obligation nor the power to give any of the work on the houses to any of the Butte unions except for the foundation and stitching work. Thus it was reasoned that at this time, the real dispute of the unions was with Interstate and Bender. Therefore pressures directed against the contractors involved them in a dispute not their own, with an object of causing such contractors to cease doing business with Interstate and Bender, and such conduct was found to be violative of Section 8(b)(4)(ii)(B).

The decision in *Bender* made it clear that to the extent the unions viewed the coming of modular houses as a threat to local jobs, they would be unable to pursue lawful work preservation objects without, at the very least, negotiating a contract with a lawful work preservation clause. The contract which Respondent Carpenters had with the Butte contractors came up for renewal in the spring of 1971. Respondent Carpenters proposed a work preservation clause in the new contract for the ostensible purpose of protecting the onsite jobs of its members against the apparent erosion that they envisaged would come about should fully prebuilt houses be brought into the Butte area. The contractors resisted such work preservation proposals.[1] The associations argued that the inevitable effect of the work preservation proposals would be to make it impractical or impossible for modular houses to be brought in and sold in the Butte area. They further argued that the lower price range of these modular houses was sufficiently below that for stickbuilt houses that their entry into the area would not interfere with or diminish the stickbuilt market but would open up a new market, and that this would have the ultimate effect of providing added work for the Butte carpenters on the modular houses as well as generally to benefit the entire Butte labor market. Respondent Carpenters, however, was not persuaded of the validity of these claims, and remained adamant in insistence that the new contract must have a work preservation clause. Other bargaining issues were resolved, but failure to agree on a

[1] The contract negotiations involved all 50 of the contractors engaged in carpentry work in the Butte area. Previous negotiations had been carried on by an association known as Silver Bow Employers Association, which had been comprised of some of the larger contractors in the area. Former practice had been for smaller contractors to become individual parties signatory to negotiated agreements. In the 1971 negotiations, however, a new association, known as Butte Contractors Association, which included the smaller carpentry contractors, was formed. The two associations carried on the 1971 negotiations jointly. When agreement was finally reached, identical contracts were signed by both associations.

work preservation clause precipitated a strike in May of 1971 that lasted for approximately 90 days. At the end of this time, the contractors capitulated and the associations signed two identical contracts, each containing Article XXII, which reads in relevant part as follows:

> CONTRACTING OR SUB-CONTRACTING OR WORK TO BE DONE AT THE SITE OF CONSTRUCTION
>
> SECTION 1. Application. The Employers are in the construction industry and both parties have elected to come under the proviso applicable to the construction industry contained in Title 29, Section 158(e) of the United States Code as amended.
>
> SECTION 2. Scope of the Foregoing. Sections 1 and 3 of this Article relates to contracting or sub-contracting and work to be done at the site of the construction, alteration or repair of a building structure or other work.
>
> SECTION 3. (A) All of the following work shall be performed at the site of construction, alteration, or repairing of the building structure or other work and shall not be sub-contracted off the job site, unless said work is done at the Employer's shop.
>
> (1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.
>
> (2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.
>
> (3) The installation of all exterior trim on the structure, or in the alternative, all interior trim on the structure.

(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal, or composition material.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops. . . .

(9) The placing and fastening of all components of the structure upon the foundation.

(B) Nothing herein shall apply to any structures in the following situations:

(1) (Omitted)

(2) When the construction work done by the Employer at the site of a pre-assembled or pre-built single family dwelling unit consists of building independent structures such as garages or other structures that are not part of the unit itself.

(C) No Employer shall be discriminated against, nor be adversely affected by the Union, for accepting and completing any sub-contracted work that conforms to Paragraph A of this Article.

(D) Nothing herein shall be construed to restrict work by carpenters or contractors when pre-fabricated or pre-built components of construction not listed in Paragraph A are utilized, installed or assembled at the site of construction.

Business Agent James Cadigan testified at length concerning Article XXII. Cadigan stated that at all times he and the membership of his union feared that bringing modular

homes into the Butte area would cause union members to lose work that had been traditionally performed by the carpenters because such work had already been done at the factories. Cadigan insisted that his concern was not with having his members do the factory work, nor with whether or not such factory work had been performed under union or nonunion conditions, but that the membership feared erosion of work opportunities should modular houses arrive at the jobsite with so much of the carpenters' traditional, and formerly necessary, jobsite work already completed. Cadigan testified that he viewed the prospects for expanding employment for carpenters in Butte to present no cause for optimism. Cadigan noted that in the past 80 years membership in Respondent Carpenters had dropped from nearly 1,000 to below 400. Cadigan stated that the economic health of Butte had long depended on the functioning of the Anaconda Copper Co. In the past ten years the Carpenters' membership had fluctuated between 300 and 400 with a top figure being reached only during those times when some special Anaconda project was under way. Cadigan noted that residential construction had been reasonably active for a period recently because of certain Anaconda expansion plans, but that in the future, he saw nothing, either in the Anaconda situation or elsewhere to support an optimistic view as to substantial residential construction. It was such considerations that made the membership deem it appropriate to take whatever steps were available to retain for themselves all the traditional jobsite work possible, Cadigan noted that in the negotiations, Carpenters had been willing to agree to accept prefabrication in substantial measure, and that Article XXII permits substantially completed factory built houses to be brought in. He stated the sole purpose of Article XXII was to insure retention of a certain minimum number of jobs.

Article XXII represents a compromise. It permits carpenters to work on prefabricated houses delivered to a jobsite with either the "exterior siding or finishing" left off, or in the

alternative, "all wallboards and/or paneling" left off. In addition, it requires the house to be delivered with either "all exterior trim" left off, or in the alternative, "all interior trim" left off. Also Article XXII provides that the installation of all interior doors, the shingling of all roofs, the installation of all cabinets and shelving, the cutting and installation of all wooden stairs and bannisters, the installation of all form work for steps and stoops and "the placing and fastening of all components of the structure upon the foundation" must be performed by jobsite carpenters. Cadigan acknowledges this to mean that the structure would arrive at the jobsite as somewhat of a shell. However, he interprets Article XXII to mean that every bit of the work enumerated must be given to, and performed by, the jobsite carpenters or there will be a violation of Article XXII. Article XXII also provides that jobsite carpenters must perform foundation work and install stairs and bannisters. These are items which in a usual situation a contractor would be asked to perform on a modular house delivered to a jobsite. Cadigan interprets Article XXII to mean that unless jobsite carpenters are given all the other work set forth in Article XXII, it will be a violation for a contractor to perform any work whatsoever even though such traditional carpenters' work is absolutely essential to make the modular house habitable. Summit Valley and Boise Cascade houses as currently manufactured arrive at jobsites with most of the Article XXII work completed. Cadigan states that this means that any work a contractor does on foundations, stitching or otherwise on such a house would be violative of Article XXII and any member doing such work would be subject to fines or other union discipline.

The record establishes that while it may not be impossible to manufacture or deliver structures in the unfinished state required by Article XXII, both Summit Valley and Boise Cascade deem such a mode of operation to be impractical. In substance, each would regard a structure only completed so as to conform to Article XXII as a different product from the fully

finished modular house each now delivers. Each believes that to undertake the fabrication of such a product would defeat many of the economic advantages of their current production line manufacturing process. They also see dangers of damage in transit both from the lack of rigidity of such a structure and from its unenclosed state in inclement weather. Each would also foresee problems in getting insurance and adequate financing for an unfinished house. In addition each views such an unfinished house as far less marketable, and in all likelihood ultimately more costly. A production change to produce such unfinished houses would be a major one which each would regard as highly undesirable even though theoretically possible.

In view of the foregoing, I am satisfied, and find that enforcement of Article XXII as interpreted by Cadigan would make it impossible for any Butte contractor to do any of the work necessary to make the Summit Valley and Boise Cascade modular houses habitable. Thus enforcement of the clause would force or require such contractors to cease doing business with these two manufacturers unless and until they changed their mode of operation so as to deliver their houses to jobsites in the unfinished state required by Article XXII.

Agreement on Article XXII was reached by the Charging Parties in August 1971. The employer associations brought 8(b)(4)(i)(ii)(A) and 8(e) charges against Respondent Carpenters charging Article XXII and the efforts made to obtain it to be unlawful within the meaning of Section 8(e). The issues raised by these charges were litigated and the Board issued a decision on November 9, 1972 in the *Silver Bow* case, *supra.* The Board dismissed the complaint in its entirety, finding that the work tasks set forth in Article XXII, "constituted work currently, traditionally and historically performed by Respondent's members, and that Respondent's objective in seeking such contractual provisions and striking to obtain them was solely to preserve the work traditionally performed by its members, and that their effect upon the use by contractor

members of modular homes, whether unionbuilt or otherwise, was purely incidental." The Board's conclusion rests primarily upon its evaluation of the Supreme Court decision in *National Woodwork, supra.* In *National Woodwork,* the Supreme Court, under circumstances to be more fully discussed below, found a union's efforts to obtain and enforce a clause designed to preserve traditional work of a contracting union to be a lawful primary endeavor. In *Silver Bow,* the Board noted, however, that the Supreme Court had not passed upon a work preservation issue where the contracting employer had no control over the nature of the product brought to the jobsite. The Board also noted that in *Silver Bow* the litigation was limited to a consideration of the language of Article XXII on its face, for at the time of the hearing no attempt had been made to enforce the provisions of the clause. Thus the legality of any enforcement attempt was not before the Board at that time. What, if any, effect subsequent efforts in that direction would have on the lawful nature of the clause itself is an issue in the instant case and will be considered below.

C. The Events Immediately Preceding and the Incidents Resulting in the Charges in the Instant Cases

While the so-called *Silver Bow* case was still pending, Respondent Carpenters took no steps to enforce Article XXII. However, after the Administrative Law Judge issued his decision in May of 1972, Respondent Carpenters, believing the legality of the clause to have been resolved in its favor, undertook to implement its enforcement. Thus it is between May of 1972 and November of the same year when an injunction issued that the particular circumstances and incidents relating to the enforcement of Article XXII took place.

In January 1972, Jack McLeod and Associates, a Butte real estate firm, became the franchised dealers for marketing Boise Cascade houses in the Butte area. McLeod's customers were

offered a choice of a suitable plan from among those available from Boise Cascade; McLeod would then forward the customer's order to Pocatello for manufacture; McLeod would then assist the customer in obtaining local financing; and McLeod would assist and direct the customer in making needed arrangements with local contractors for putting in a suitable foundation and performing the needed stitching work. It was the responsibility of Boise Cascade to transport the house from Pocatello to the Butte area. This would be done by a house-moving contractor chosen by Boise Cascade. At times material to us, Boise Cascade used the services of Reed Lemmons, who both transported the house and placed it on a waiting foundation.[2] At times, McLeod would purchase a Boise Cascade house himself to sell on speculation. In such cases, McLeod would make his own arrangements with local contractors. In other cases, it would normally be the customer who assumed this responsibility with McLeod acting only in an advisory capacity.

Summit Valley is a local Butte enterprise. It did not come into being until June of 1972. Summit Valley is owned by a number of Butte residents including Gene Spolar who, in addition to being part owner, also serves as plant manager. Prior to undertaking the management of Summit Valley, Spolar had been a building contractor in the Butte area, owning and operating a business known as Spolar Construction, Inc. Spolar Construction, Inc. was party signatory to the collective-bargaining agreement with Respondent Carpenters which includes Article XXII. Although Spolar Construction, Inc. may still exist as an entity, it does not appear to have functioned actively as a building contractor after Summit Valley began its operations in June with Gene Spolar in charge. In hiring employees for Summit Valley, Spolar made no effort to hire employees skilled in any building construction crafts. Instead,

[2] In the record the name of this contractor is variously referred to as "Red Lemon," "Reed Lemons", and "Reed Lemmon." All references are to the same housemover.

from the outset, Spolar hired unskilled workers and undertook to give then job training in the manufacturing process. Respondent Carpenters initially believed Spolar Construction to be operating the plant in violation of its contract and its bargaining obligation and it filed charges to such conduct. These charges were subsequently withdrawn by Respondent Carpenters when it learned that Summit Valley was an entirely separate entity. Shortly after the plant opened, Butte Teamsters Union, Local No. 2, herein called the Teamsters, undertook to organize the Summit Valley plant employees. Neither at that time, nor at any time later, has Respondent Carpenters made any claim to represent the plant employees at Summit Valley. Summit Valley accorded the Teamsters recognition as the statutory representative of its employees, and in September 1972 executed a contract with the Teamsters covering the working conditions of such employees. The bargaining unit is described as "all production workers, fabricators, erectors, assemblyline workers, maintenance workers, cleanup workers, watchmen, and drivers employed by the employer at its Butte, Montana, operation."

Aside from the alleged unlawful nature of Article XXII itself, the other conduct claimed to be unlawful falls into two general categories: (1) pressures directed against the Butte contractors bound by Article XXII or against the employees of such contractors; and (2) pressures directed against Summit Valley or Boise Cascade either directly or through their agents or employees, including a work assignment issue which involves Summit Valley alone.

1. Incidents involving the contractors

Pressures were directed against various of the contractors bound by Article XXII with respect to work to be done at Butte jobsites on modular houses manufactured by both Summit Valley and Boise Cascade.

The Jovick Incident—Jovick Construction, Inc., is a local Butte contractor. Jovick had been engaged to install a house foundation and attached garage at a Butte jobsite. At the time he undertook the job, Jovick had no knowledge that the owner was planning to place a Summit Valley house on the foundation. On October 3, 1972, Cadigan directed Leo Calcaterra, a union member that Cadigan observed shingling a roof on an attached garage, to stop work. Cadigan told Calcaterra that "these modular homes are unfair to our contract," and that "we weren't supposed to work on them." Calcaterra immediately left the job and reported to Jovick. Subsequently, Jovick met with Cadigan who told him in substance that he could not put in foundations for, or do any work whatsoever on, Summit Valley houses unless and until they came to a jobsite in the unfinished condition required by Article XXII. Cadigan concedes that he told Jovick that any work on a Summit Valley house would be a violation of Article XXII. When Jovick continued to work on the job after learning this from Cadigan, charges were brought against him as a member of Respondent Carpenters for violating his union obligations. The union trial committee found Jovick guilty of violating his obligation to "abide by the rule of the majority, which says that he will do the work under Article XXII." The trial committee recommended that Jovick receive the maximum penalty.[3]

The Perusich Incident—Bill Perusich, another Butte contractor, had been engaged to install a foundation for what he later learned was a Boise Cascade house. On or about August

[3] At the same trial, Jovick was also found guilty of using his two sons to help in erecting concrete forms. The General Counsel suggests that Cadigan in ordering Jovick to cease using such forms was harassing him because the forms belonged to Gene Spolar and that this was just another facet of the unlawful pressure. I am not satisfied from this record that the charges relating to Jovick's sons necessarily have a direct relationship to the issues with which we are concerned in this proceeding and accordingly make no finding relating thereto.

24, 1972, when two of his employees were working on such job, Cadigan appeared at the jobsite and told the employees that they "couldn't work on this particular job." Responding to their questions Cadigan advised them "that McLeod was unfair" and had "brought scab labor and set the houses up on the foundation." Cadigan also advised the employees that union members "were either going to get 50 percent of the work on the houses, or [they] weren't going to do any of it," and that if they continued working on the job they might be fined. Perusich later saw Cadigan about the problem and obtained permission from him to finish up his work on that one house. Cadigan, however, made it clear to Perusich that unless McLeod or Boise Cascade fully complied with Article XXII and brought houses to the jobsites in the condition required by Article XXII, there was to be no more work on such houses. Cadigan admits that he ordered the employees off the job, and that he discussed the requirements of Article XXII with Perusich.

The Lutey Incident—Lutey Construction, another Butte contractor, had an employee working on foundation forms for a Boise Cascade house. On October 13, 1972, Cadigan ordered the employee off the job, telling him that union members were not to work on modular houses, and that if he continued to work on the job, "he could be in serious trouble." The employee left the job. Lutey subsequently communicated with Cadigan who explained that under Article XXII he should not work on any modular houses whether the work related to foundations or any other thing. Cadigan did, however, give Lutey permission to strip the forms that had already been put in. Lutey sent his son to the job for this purpose a few days later. The son came to the jobsite at a time that Lemmons was in the process of placing a Boise Cascade house on the foundation. According to the son, Cadigan arrived at the job and told him "that he had better pick up his tools and get off the job, that this was a nonunion job." Cadigan's version of the incident does not differ substantially. He admits that he

ordered the employees from the job because any work on a Boise Cascade house would be done in violation of Article XXII. He states, however, that the fact that Lemmons Moving Co. was nonunion was an irrelevant consideration because, even had the contractor himself been placing the house on the foundation, this too would have been a violation of Article XXII, and the employees would have been directed to leave the job, and they and the contractors, had they declined to follow such directions, might have been subjected to union fines.

In none of the foregoing incidents did any contractor have power to control the state of completion in which the modular house was to come to the jobsite. As we have seen with the exception of the foundation and some of the needed stitching work, the modular houses being sold by Summit Valley and Boise Cascade arrived at the jobsite with all other Article XXII work, both inside and out, completed. Thus, although the construction of a foundation and the required stitching were essential to make the houses habitable, the contractor was powerless to perform any of the other Article XXII work because it already had been done. It was the purchaser, not the contractor, who was responsible for the type of house to be delivered. The manufacturers, Summit Valley or Boise Cascade, alone directly controlled the finished or unfinished state of the houses they were marketing.

2. The pressures against Summit Valley, Boise Cascade, their agents or employees

With respect to Boise Cascade there were several incidents involving pressures directed against its agents or employees which are claimed to constitute unlawful inducement or coercion within the meaning of Section 8(b)(4). With respect to Summit Valley, the alleged unlawful pressures concern a pattern of events allegedly aimed at both enforcing Article XXII and compelling the work assignment.

The Lemmons Incident—Reed Lemmons is a housemover under contract with Boise Cascade to deliver Boise Cascade houses to the Butte area. In early August, while Lemmons and his crew were placing a house on a foundation, Cadigan visited the jobsite. According to Lemmons, Cadigan asked if Lemmons' employees were union and upon learning that they were not, told Lemmons he must leave the jobsite. According to Lemmons, he understood Cadigan to represent that setting a house on a foundation was carpenters' work, and that Respondent had an agreement with Boise Cascade that houses were not to come to the jobsite fully built but in an unfinished state so that carpenters could finish them. Lemmons declined to leave explaining that the house belonged to McLeod and that he would leave only if McLeod told him to. At this point, Lemmons says Cadigan replied, "I'll have pickets out at 8 in the morning." Cadigan concedes he was aware that the house had been manufactured by Boise Cascade, and admits telling Lemmons that the work of unloading the house belonged to the carpenters. He also admits asking Lemmons if the crew belonged to any local of the Carpenters Union although he denies threatening Lemmons that Carpenters would picket if he refused to leave. Lemmons completed his unloading work and no picketing ever ensued.

The McLeod Incident—Following the confrontation with Lemmons, McLeod and Cadigan met several times and discussed the problems of bringing in Boise Cascade houses. Although there are some differences in the versions of each as to what transpired in these discussions there is no basic conflict. Thus, Cadigan made it clear to McLeod that the work of placing modular houses on foundations belonged to the Butte carpenters. He also made it clear that houses were not to come into the Butte area unless they were in the partially unfinished state required by Article XXII. Cadigan suggested that possibly McLeod's dealership indicated he was going into the contracting business, and that if this were so, like all other

contractors in the area he must also be bound by Article XXII. Admittedly, Cadigan presented McLeod with a copy of the contract and suggested that he sign it, indicating that unless he did so, Respondent Carpenters would take steps to see that no more Boise Cascade homes were brought into Butte. I view Cadigan's confrontations with McLeod as one facet of his efforts to press for enforcement of Article XXII. Basically, and this is not denied by Cadigan, he was representing to McLeod that no houses were to come into Butte that did not meet the requirements of Article XXII. If McLeod were to undertake the work himself as a contractor, he too was to be bound by Article XXII. If local contractors were to be hired, they would only function pursuant to Article XXII. Essentially, Cadigan was threatening McLeod either with picketing or with other consequences if he continued to bring Boise Cascade houses into the area in their present finished state. He was pressing McLeod either to stop bringing them in altogether, or else to make such changes in his arrangements with Boise Cascade that they would come in the unfinished state required by Article XXII.

The Garry and Pratt Incidents—Possibly as a result of the difficulties McLeod was having in placing the Boise Cascade houses on Butte jobsites, at some point in late September or early October, Boise Cascade assigned two of its Pocatello employees, David Garry and Doyle Pratt, to do needed stitching work on Boise Cascade houses in the Butte area. Both Garry and Pratt were members of Carpenters Local 1258 in Pocatello. Before going to work in Butte both visited Cadigan at his office. According to Garry, when they explained their purpose in coming to Butte, Cadigan stated, "There is no work for Boise Cascade," because Boise Cascade "is not signatory to our local agreement." Following this, Garry stated, Cadigan told them that if they went to work, "We will slap a picket on the job." Upon receiving this information, the two employees advised Cadigan that both were members of a carpenters local

in Pocatello and that neither had come to Butte to cause problems there. The two men left and advised McLeod that Cadigan "would not let [them] go to work." Thereafter, both returned to Pocatello. Cadigan denies that he ever indicated that Boise Cascade should sign a contract with his union, or that he ever threatened to picket the job if the men worked on it, but he concedes that he did discuss Article XXII with them at some length, and he confirms that they voluntarily agreed that they did not wish to cause problems in Butte and would return to Pocatello.

The Summit Valley Incidents—As we have seen, Summit Valley entered into a contract with Teamsters shortly after it commenced its operation in June of 1972. While this agreement was primarily applicable to the production and maintenance workers at the plant itself, it contained a provision which reads as follows:

> The employer recognizes the jurisdiction of the Union over all manufacture and assembly work, including following the product to its final destination and preparation of the site, so as to preserve and protect the integrity of the products manufactured by the bargaining unit.

The Jovick incident establishes that because of Article XXII employees of the contractors were not to do onsite work on Summit Valley houses. Accordingly customers of Summit Valley requested that Summit Valley undertake the needed work pursuant to the contractual provision in the Teamster contract above set forth, in order that the modular houses purchased from Summit Valley might be made habitable. It was shortly after this that Respondent placed a picket at the Summit Valley plant. The picket carried a sign reading:

> This employer does not employ members of Carpenters Union in the work to be performed on this building. Local 112, Carpenters Union, AFL-CIO.

The building referred to in the picket sign was a completed modular house manufactured by Summit Valley, which was situated in close proximity to the picket sign. This picketing brought about the charges filed by Summit Valley in 19-CD-212. This case in combination with 19-CC-588 and 591 resulted in the General Counsel obtaining a 10(l) injunction from a U.S. District Court which issued on November 8, 1972.[4]

Following a 10(k) hearing in 19-CD-212, the Board issued a Decision and Determination of Dispute in *United Brotherhood of Carpenters & Joiners of America,* 202 NLRB No. 153 on April 6, 1973. The findings of the Board as set forth in that decision need not be repeated here. Suffice it to say that the Board concluded that employees of Summit Valley, currently represented by Teamsters, "are entitled to the work of manufacturing or building of prebuilt or modular homes and other structures, *including work necessary to make these structures habitable,* to the extent that all such work is claimed by the United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, pursuant to its collective bargaining agreement with Silver Bow Employers Association and Butte Contractors Association." (Underscoring supplied) Thereafter, Respondent Carpenters advised the Regional Director that it would not require Summit Valley to assign work in violation of the Act but stated further:

> That the Union affirms that it has the right, and will under some circumstances use its rights under the National Labor Relations Act, to truthfully advise the public, whether by picketing or other publicity that the Summit Valley In-

[4] By terms of the injunction Respondent Carpenters were enjoined from picketing or otherwise inducing employees of Jovick with an object of forcing Summit Valley to assign work to employees represented by Respondent Carpenters rather than represented by Teamsters, and also enjoined from unlawful enforcement of Article XXII by forcing the contractors to cease doing business with McLeod or Boise Cascade. Such injunction is still in effect.

dustries, Inc., does not employ members of, or have a contract with the United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, if, in fact, such is the truth and such picketing or publicity is for the sole purpose of advising the public of the situation.

Inasmuch as Respondent Carpenters had made a similar informational claim during the course of the 10(k) hearing the Regional Director did not construe the language set forth above as an unequivocal disclaimer of Carpenters' interest in obtaining the onsite work. Accordingly, the complaint in the CD case was issued. No evidence was adduced in the instant proceeding indicating that the situation thereafter has changed in any particular.

3. Summary as to the incidents

All violations of Section 8(b)(4) have a dual aspect. First, they must show conduct which amounts to unlawful inducement of employees, or restraint and coercion of employers, and thus it must be shown that such conduct was undertaken for an object proscribed by the statute. The incidents which have been set forth above are substantially undisputed. While some variance exists in the testimony of Cadigan and that of other witnesses with respect to happenings regarding individual incidents, the central thrust of Cadigan's conduct whether with respect to employees, contractors, or others, stands out clearly. Respondent Carpenters had undertaken a three-month strike to obtain a work preservation clause which it believed to be lawful. The legality of the clause had been attacked, but after litigation and an initial decision the Carpenters' position on Article XXII had been upheld. The clause was apparently lawful within the meaning of *National Woodwork*. Understandably Cadigan now deemed it appropriate to enforce it and he proceeded in a forthright and undisguised manner to do so.

Clearly Cadigan's directions to employee-members of Respondent Carpenters to leave jobsites in the Jovick, Perusich,

and Lutey incidents represent inducement of employees within the meaning of Section 8(b)(4)(i) and I so find. Cadigan's discussions of Article XXII with the employer contractors occurring in connection with the same incidents were intended to be and clearly came through as threats of reprisal should the contractors continue to work on modular houses arriving at jobsites in a condition which did not conform to the requirements of Article XXII. Such conduct by Cadigan constitutes restraint and coercion of such employers within the meaning of Section 8(b)(4)(ii), and I so find.

The foregoing incidents each involved employers bound by the provisions of Article XXII. The Lemmons, the McLeod, the Garry-Pratt, and the Summit Valley incidents each involve conduct directed against persons not in privity of contract with Respondent Carpenters. The threats or inducement by Cadigan, however, are equally well established. Despite his denial, I have no doubt that Cadigan threatened Lemmons with the possibility of picketing should Lemmons continue to place Boise Cascade houses on foundations. Cadigan was also threatening McLeod with reprisals should he continue to bring in Boise Cascade houses in their finished state. Becoming bound to, and abiding by, a contract with Article XXII was one way McLeod could meet the problem. Since McLeod was a dealer for Boise Cascade, this was at the same time a threat against Boise Cascade to change its operation to conform to Article XXII or face problems with its houses coming to the Butte area. Thus I find Cadigan's conduct toward both Lemmons and McLeod to constitute threats and coercion against each of them and against Boise Cascade within the meaning of Section 8(b)(4)(ii). With regard to Boise Cascade employees Garry and Pratt, Cadigan urged them as union members not to work on Boise Cascade houses in the Butte area, and indicated they might have trouble with his union should they attempt to do so. This was obviously inducement of these employees not to work on Boise Cascade houses in Butte within the meaning of Section

8(b)(4)(i) and I so find. With respect to Summit Valley, the picketing was both inducement of employees of Summit Valley and restraint and coercion of Summit Valley within the meaning of Section 8(b)(4)(i) and (ii), and I so find. Whether any or all of these incidents of restraint and coercion were for a proscribed object, and then became conduct violative of Section 8(b)(4) is to be considered below.

D. The Alleged Unlawful Objects

Respondent Carpenters does not seriously contest that it engaged in the various pressures, as described above, both to attain and enforce Article XXII. It defends such conduct by asserting that it was undertaken for the lawful primary object of obtaining and enforcing a lawful work preservation clause. The General Counsel and the Charging Parties claim the enforcement efforts against both contracting and non-contracting parties to have had an unlawful object within established Board doctrine. Further, they claim that such enforcement efforts, coupled with various "surrounding circumstances," warrant a finding that "entering into" a contract containing Article XXII is unlawful within the meaning of Section 8(e) and that pressures to attain it were violative of Section 8(b)(4)(A).[5] To

[5] The General Counsel and the Charging Parties correctly point out that the term "entering into" is not limited to the initial signing of an agreement but that, at least for 10(b) purposes, a contract may be viewed as reaffirmed or "reentered into" when its terms are acquiesced in or enforced by the parties. This record establishes without dispute that Respondent Carpenters pressed for enforcement of Article XXII, bringing pressures against both the contractors and their employees, and that the employers yielded to such pressures. Therefore they may be said to have "entered into" the contract at the times such pressures were asserted. Thus we are not precluded from considering the validity of Article XXII *per se* as distinguished from the manner of its enforcement. *Dan McKinney Co.*, 137 NLRB 649; *Milk Drivers and Dairy Employees Local Union No. 537 (Sealtest Foods)*, 147 NLRB 230.

resolve these issues we must first consider the work preservation concept as evolved by the Board and the Courts, and then undertake to apply it to the facts and circumstances surrounding this case.

The decision of the Supreme Court in *National Woodwork* sets the basic parameters of the work preservation concept.[6] We will consider the holding of the Supreme Court in this case and its limitations, as well as the various interpretations later made by the Board and the Courts of its full meaning.

The basic issue before the Court in *National Woodwork* involved a so-called product boycott situation, a common occurrence in the construction industry. A product boycott may occur when an employer brings a prefabricated product (i.e., doors, cabinets, an entire house, etc.,) to his jobsite, his employees are asked to install or otherwise work on such product and a union brings pressure of one sort or another, designed to prevent the employees from handling or otherwise working on the product. When the employer yields to pressure of this nature, he must, in effect, "cease doing business" with the producer of the product, and either obtain the product elsewhere or have his own employees produce it for him.[7] No

[6] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 64 LRRM 2801.

[7] In relevant part Section 8(b)(4) and Section 8(e) read as follows:

> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(Footnote continued on next page.)

purpose will be served by an historical analysis of Section 8(b)(4) and Section 8(e). Suffice it to say that the protections

(Footnote continued from preceding page.)

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;
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> * * *
>
> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: . . . .

of employers against union pressures to cease doing business with other persons were in a measure aimed at product boycott situations. It is with the limitation on the degree of this statutory protection that *National Woodwork* concerns itself. Its basic holding is that the scope of the protection is not unlimited, and that not every situation where there is a cease doing business object and effect will render the pressures unlawful.

In *National Woodwork*, we find a subcontractor (Frouge) working at a construction jobsite. Frouge had a contract with a union whereby he had agreed that union members would not be required to handle prefabricated doors. Nevertheless, Frouge purchased and brought prefabricated doors to the jobsite to be installed. The union ordered its members not to handle them. Fabrication of doors by union members was admittedly their traditional work, and Frouge's contract with the general contractor did not preclude his bringing so-called "blank doors" to the jobsite for his employees to fabricate. The Court undertook an elaborate review of the legislative history, but the justices split five to four on its meaning. All the justices agreed that if the clause be deemed lawful and enforced it would have the necessary consequence of forcing Frouge to cease doing business with the fabricators of doors. The statute appeared to proscribe any object of this nature in explicit terms. This sufficed for the dissenting justices to find the clause unlawful. The majority, however, viewed the legislative history as requiring a less literal interpretation. The basic purpose of Section 8(b)(4) and Section 8(e) was viewed as protecting neutrals against involvement in a dispute not their own, but the majority felt this should not be construed to mean that a union must forego its right to bring pressures against the primary employer directly involved in the dispute. The fabrication clause in Frouge's contract was viewed as having as a basic purpose preservation of traditional work which had been done by Frouge's employees at the jobsite. Sections 8(b)(4) and 8(e) were not to be viewed as protecting an employer against

pressures where the pressures were aimed at protecting traditional work of this nature, even though exercise of such pressures had the collateral secondary effect of causing the employer to cease doing business with another person. Such effect was to be viewed as an incidental consequence, and not as a limitation on pursuit of the primary right to preserve traditional work. The clause was therefore held to be a lawful work preservation clause, and union pressures to enforce it likewise lawful.

The *National Woodwork* holding, however, was limited in scope. As noted above, Frouge was not required by any contractual arrangement with his general contractor to use prefabricated doors. He had the power to give the jobsite fabrication to his own employees, and that is all they sought. The Court stated specifically that it was not passing on a situation where a contractor did not have "control" over the work a union sought to preserve for its members. The Court also noted that determination of a work preservation object was not something casually made, but rather, something demanding careful inquiry. In this connection, the Court said:

> The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated Section 8(e) and Section 8(b)(4) cannot be made without an inquiry into whether under all the surrounding circumstances, *the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.* Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that

> employer or benefits to other than the boycotting employees or other employees of the primary employer, thus making the agreement or boycott secondary in its aim. *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.* This will not always be a simple test to apply. But "however difficult the task of drawing lines more nice than obvious, the statute compels the task." (Underscoring supplied)

In a footnote, the Court in referring to the "surrounding circumstances" indicates that such "might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry."

Unlike Frouge, the Butte contractors could not control the type of house that would be put on a jobsite. The purchaser engaged a contractor to build a foundation or do certain work on a structure he brought to the jobsite. If it were a modular house, the purchaser had selected it from the group available from the manufacturer, and the latter had determined the state of completion in which the house was sent to the jobsite. As we have seen, the Summit Valley and Boise Cascade houses were delivered with much of the Article XXII work already completed. Thus the case before us falls in an area which the Supreme Court did not pass upon in *National Woodwork*. We must therefore consider whether this control circumstance calls for a different result either with respect to "entering into" a contract with a work preservation clause, or in relation to its enforcement. There has been considerable post *National Woodwork* litigation centering on enforcement of work preservation clauses where the contracting employer had no right to control. The Board position in this area is now well established. Accordingly we will treat with that phase of the problem first.

1. The alleged 8(b)(4)(B) violation

In the cases following *National Woodwork* where the contractors have had no right to control the products coming to the jobsite the Board has consistently found pressures to enforce work preservation clauses to be conduct violative of Section 8(b)(4)(B). The Board has reasoned that in such situations the contracting employer was not really the primary employer, because he was powerless to grant the union demand. Therefore he must be deemed a neutral, and the union's efforts secondary. The demand could only be met by having the manufacturer or supplier either cease to do business altogether with the contractor, or change his mode of operation to accord with the union requirement. Pressure to attain either result was viewed by the Board as a proscribed secondary object.

This approach was not accepted by Courts of Appeal in some circuits.[8] The reasoning of these courts centered on their view that after *National Woodwork* it became improper for the Board to regard a contracting employer's right of control as sufficient in and of itself to make him a neutral in the dispute. In *Local 742 Carpenters*, the Court of Appeals for the District of Columbia expressed its views as follows:

> The Board's test flies in the face of *National Woodwork* in three respects: (1) It elevates one circumstance—where the immediate "control" lies—to *per se* status, rather than evaluating "all the surrounding circumstances." More than mere form is at stake here. The Supreme Court properly recognized that realistic assessment of the union's objective in a particular situation is a complex, subtle matter and

[8] *N.L.R.B.* v. *Local Union 164, I.B.E.W.*, 388 F.2d 105 (C.A. 3); Local 636, *Plumbers Union, (Mechanical Contractors Association of Detroit)* v. *N.L.R.B.* 430 F.2d 906, 74 LRRM 2851 (C.A.D.C.); *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d. 556 (C.A. 8); *Local 742 Carpenters Union (J.L. Simmons Co.)* v. *N.L.R.B.*, 444 F.2d. 895, 76 LRRM 2979 (C.A.D.C.).

> must depend on a variety of evidential factors. A mechanical *per se* rule simply cannot sift and weigh the evidence with the required sensitivity. (2) A more basic failing of the "right to control" test under *National Woodwork* is that it focuses on entirely the wrong set of circumstances. It is concerned solely with which party presently has the power to satisfy the union's objective, rather than focusing on the substance of the object itself. Thus it misses the point of the primary-secondary distinction as set forth in *National Woodwork*. (3) And more particularly, the Board's test fails to evaluate the substance of the union's objective by looking to see whose labor relations it is addressed to. That is the crucial matter under *National Woodwork*. If the union's grievance has to do with some third party's relations with his employees, the pressure it exerts against its members' employer may well be secondary. But *National Woodwork* makes clear that, if the grievance has to do with the labor relations of the pressured employer with his own employees who are exerting the pressure, then the activity is probably primary and permissible under Section 8(b)(4)(B). The Supreme Court has held that an objective of preserving traditional work for the union's members with the pressured employer is definitely primary. The fact that the employer may have to cease doing business with another party to satisfy the union's demand is a permissible ancillary effect. Of course, there may be cases where the union's objective is not clearly, or only party, to preserve its members' work. But the *per se* "right to control" test would declare an activity to be secondary without any inquiry whatever into such matters.

In the instant case full acceptance of the rationale of these cases could lead to a holding that the execution and enforcement of Article XXII was lawful. The Board, however, has expressed continuing disagreement with the approach taken by these courts. At the present time, the Court of Appeals for the

Fourth Circuit has upheld the Board in its approach to the problem. The Board case in which its view has been most fully explicated is *Local No. 438, Plumbers Union, (George Koch Sons)* 201 NLRB No. 7, herein called *Koch*. Since it is the Board's view that governs disposition of the issues here, we must take a somewhat detailed look at the Board's approach in *Koch*, and then consider its applicability to the circumstances which confront us.

George Koch & Sons had a contract to manufacture and install certain industrial finishing systems in a General Electric Company plant. The contract with General Electric called for certain of the pipes to be prefabricated and pretested before being installed. Koch subcontracted the installation of all pipe at the General Electric plant to Phillips Plumbing & Heating Co. Phillips had a contract with respondent union which provided, in substance, that all pipe used on the job had to be cut and threaded by union members at the jobsite. The Board conceded that the contract clauses "are valid work preservation clauses and that in their actions alleged as violations here, the Respondents were motivated by work preservation aims . . ." When Koch shipped prefabricated pipe to the plant to be installed by the Phillips employees, the latter were instructed by their union to refuse to do the work because the prefabricated pipe did not meet the contractual requirements calling for jobsite cutting and threading. This conduct resulted in the filing of 8(b)(4)(B) charges. The Board found the conduct violative of the Act.

In its decision, the Board noted that Phillips, in contrast to Frouge in *National Woodwork*, had no control over the type of pipe he was to install. The contract between Koch and General Electric specified that in certain areas prefabricated pipe was to be installed. The work on such pipe had already been done when it reached the plant. Thus Phillips was powerless to assign the cutting and threading of such pipe to his own employees. The Board concluded that although a union might

legitimately enforce work preservation clauses in situations like that in *National Woodwork*, it was foreclosed from doing so where the contracting employer had no power to award the work sought to be preserved. The Board reasoned that although the union may have been initially motivated by a work preservation aim in seeking the contract clause, it was now bringing pressure in a situation where the particular employer was incapable of acceding to the union demand. Since the pressured employer, even though also the contracting employer, could not give the union the work, his position became in effect that of a neutral. The Board stated:

> Since it was impossible for the pressured employer to itself accede to Respondent's actions but not impossible for another to award this work, and since we have deemed it reasonable to view the object of the Respondent's actions not as an impossible act, but as the possible alternative, we have found that the Respondent's actions were undertaken for their effects elsewhere, and that the pressured employer, here Phillips, was a secondary. Since Phillips was a secondary here, and since the Respondent's actions did have as an object the causing of Phillips to cease doing business with Koch, the Respondent's actions here violated Section 8(b)(4)(B) of the Act.

The Board went on to note that in finding the violation of Section 8(b)(4)(B) it was not passing on the Union's right to bring a civil suit for breach of contract. The Board further undertook to comment upon the scope of its disagreement with certain Courts of Appeal which had had occasion to pass on cases involving a right to control issue. The Board denied that in considering cases of this nature it had ever looked solely at the pressured employer's right to control. In this connection the Board stated:

> Rather, the Board has always proceeded with an analysis of (1) whether, under all the surrounding circumstances, the union's objective was work preservation and then (2)

whether the pressures exerted were directed at the right person, i.e., at the primary in the dispute. For the reasons set forth, *supra,* we think this approach fully conforms with *National Woodwork* and is in fact compelled by Section 8(b)(4)(B). In following this approach, however, our analysis has not nor will it ever be, a mechanical one, and in addition to determining, under all the surrounding circumstances, whether the Union's objective is truly work preservation, we have studied and shall continue to study, not only the situation the pressured employer finds himself in, but also how he came to be in that situation. And if we find that the employer is not truly an "unoffending employer" who merits the Act's protection, we shall find no violation in the Union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation. The evidence shows, however, that here Phillips was an unoffending employer and that by threatening to refuse and by refusing to install the prefabricated pipe for Phillips, the Respondents violated Section 8(b)(4)(B) of the Act.

The Board's decision was reviewed by the Court of Appeals for the Fourth Circuit, and on December 14, 1973, that court in *George Koch & Sons, Inc.* v. *N.L.R.B.,* 84 LRRM 2957, issued a decision fully upholding the Board. By way of further explication and support, the Court stated the following:

> The decisive question, therefore, is whether in the light of "all the surrounding circumstances" the agreements and boycott between Phillips and the unions were "tactically calculated to satisfy union objectives elsewhere." We think the Board was right in concluding that they were.
>
> To begin with, since the unions were aware of the conditions in the Phillips-Koch pact, they knew that Phillips did not have control of the pipe fabrication.

> Consequently, their enforcement of the collective bargaining terms evinces the union's intention to press their objectives "elsewhere" other than upon Phillips.
>
> Moreover, Koch and the unions were not in privity; neither was bounden to the other. Koch, then, was a neutral, and yet with regard to it the unions still sought to prosecute the conditions in order to "satisfy the union objectives" beyond Phillips. This, too, is precisely—and even more emphatically—the posture of the unions with respect to G.E. To repeat, these facts confirm the Board's finding of the tactical effect.
>
> These conclusions are not gainsaid or diminished by the unions' insistence that the stipulations are enforceable as work preservation measures. The Board did not nullify the clauses as work preservation assurances; they remained available for appropriate application. However, regardless of their initial intendment, they could by undue extension, over and above the Phillips-employee relationship, lead to violations of Section 8(b)(4)(B) of the Act.
>
> That the clauses have been so exerted in this instance is, it appears, precisely the illegality the Board perceived in the unions' actions. Like the Board, we see Phillips as not an "offender" but rather a neutral vis-a-vis its employees; therefore the effect of the strike was to compel Phillips unlawfully "to cease doing business with any other person." Granted, the efficacy of work preservation covenants is not to be stunted because of the severity of their impact. . . . Nevertheless, if a result of that pressure is to cause a neutral employer (here Phillips) to terminate his business with another (Koch), then such enforcement fouls the Act.

The Court went on to point out that its decision did not give an employer license to contract out work without limitation. The Court indicated that if there was any element of connivance or complicity in which the employer was seeking to avoid its

obligations toward the union, then a different result would be reached. However, in the instant case, there was a contract between Koch and General Electric that controlled the type of pipe that was to come to the jobsite, and Phillips did not surrender his right to control for he never had any.

Although we will consider below the lawful nature of the work preservation clause itself, the 8(b)(4)(B) violation within the *Koch* rationale does not depend on that determination. As noted above, the clause was not specifically attacked in *Koch*. *Koch* includes an express finding that the parties had a lawful work preservation clause in their contract.

In *Koch* we had Phillips bound by a contract with a work preservation clause requiring certain traditional work to be done at the jobsite. The Butte contractors are also bound by a contract with Respondent Carpenters with a work preservation clause requiring that certain traditional carpenters' work be done at the jobsite by employees of the contractors. Phillips had no control over the pipes to be delivered to the jobsite for installation. Koch's contract with General Electric determined that some of the pipes were to be brought in a prefabricated state. The purchasers of modular houses engaged Butte contractors to install foundations or perform certain work on these houses after they had been placed on foundations. The Butte contractors had no control over the type of house to be placed on the foundation, or the condition in which such house would arrive at the jobsite. Summit Valley and Boise Cascade sold only completed modular houses with much of the work noted in Article XXII already finished. In *Koch,* the union refused to let Phillips' employees install the prefabricated pipe, relying on the provisions of their work preservation clause. In the instant case, Respondent Carpenters brought pressures against the contractors and their employees to refuse to work at all on Summit Valley or Boise Cascade modular houses unless and until the employees were given all the Article XXII work. There was no way whatsoever that Phillips could give his

employees the onsite pipe work. In response to union pressure, Phillips could do no more than attempt to persuade Koch or General Electric to change the basic format and give him nonfabricated pipe to install. If this were not possible, Phillips could only meet the pressure by ceasing to do business altogether with Koch at the General Electric project. There was no way that the Butte contractors could give the onsite carpentry work required by Article XXII to their employees. They could respond to the union pressure only by seeking to persuade Summit Valley or Boise Cascade to bring houses to the jobsite in the condition which Article XXII required, or else by ceasing to do any work on Boise Cascade or Summit Valley houses whatsoever. As in *Koch,* there is no showing in the instant case that the contractors surrendered any right to control this work assignment for they never had had it. The union in *Koch* was apparently aware that Phillips had no control over the type of pipe which was to come to the jobsite. Respondent Carpenters must also have been aware that the contractors did not control the condition in which Boise Cascade or Summit Valley houses were shipped to a jobsite.

Under the circumstances, I see no difference in substance between the 8(b)(4)(B) issue presented to the Board in *Koch* and that before us in the instant case. Accordingly, I must conclude, as the Board did in *Koch,* that even assuming the work preservation clause to be valid and Respondent Carpenters to have been motivated by a work preservation aim, it, like the union in *Koch,* undertook to achieve its ends by the unlawful means of bringing pressures against contractors who were incapable of acceding to their demands. As in *Koch,* and for essentially the same reasons, this conduct must be regarded as having been undertaken for its effects elsewhere, and the pressured employers must be deemed neutrals entitled to the protections of Section 8(b)(4)(B). Accordingly, I find that with regard to the various pressures heretofore found to have been directed against the contractors or their employees, Re-

spondent Carpenters were undertaking to cause such contractors to cease doing business with Boise Cascade, Summit Valley, their agents or dealers, unless or until such employers changed their operations to conform to Article XXII, and that such pressures pursued for such a proscribed object constitute conduct violative of Section 8(b)(4)(i)(ii)(B) of the Act.

Having found Respondent Carpenters' pressures against the Butte contractors to be unlawful within the *Koch* rationale, there remains the question of whether a similar result follows with regard to the pressures directed against McLeod, Lemmons, the Boise Cascade employees, and Summit Valley. *Koch* tells us that the Butte contractors, like Phillips, are neutral employers, protected from pressure when they find themselves in a situation in which they are powerless to meet the Union's demands. The pressures against McLeod, the Boise Cascade employees and Summit Valley, even though having the same underlying work preservation aim, arise in a different context. Unlike the Butte contractors, Boise Cascade and Summit Valley could change their mode of operation and could manufacture and deliver houses which would leave the Article XXII work for the jobsite carpenters. It is a fair assumption that in asking McLeod, the Boise Cascade dealer, to sign a contract with Article XXII, Cadigan was pursuing another means of pressing Boise Cascade either not to send its modular houses to the Butte area, or, if doing so, to bring them in with the Article XXII work still to be done at the jobsite. A similar aim seems likely with regard to the direct pressure Cadigan brought to bear on Lemmons and the Boise Cascade employees. Likewise, the picketing of Summit Valley was designed in part to press that employer, either to deliver the houses to the jobsite in a condition which conformed to Article XXII or else not to deliver them in the Butte area at all. Unlike the Butte contractors, however, neither Boise Cascade, Summit Valley, Lemmons, nor McLeod had ever had a contractual relationship with Respondent Carpenters covering any work to be done by

their employees. To the contrary, Cadigan expressly disclaims interest in representing plant employees of either Boise Cascade or Summit Valley, while McLeod is a Butte realtor who has never directly employed carpenters.

Underlying *National Woodwork* is the concept that a union may protect traditional unit work of employees who are working for a particular employer. Necessarily this envisages the existence of an established bargaining relationship between the union and the employer, or there will be nothing that can be preserved. In *Koch* the Board carried the concept a step further holding the union, in effect, had no work to preserve when the employer, without connivance or complicity, was unable to give his employees the work because of circumstances beyond his control. If in a *Koch* situation the pressures against a contracting employer be deemed secondary, similar pressures directed against a noncontracting employer present an *a fortiori* situation. Although the latter, unlike the former, might not be powerless to meet the union's demands, the pressure against him can scarcely be viewed as having a primary work preservation object, because no bargaining unit or bargaining relationship exists. The pressure is thus not addressed to the "labor relations of the contracting employer vis-a-vis his own employees" but must be seen as "tactically calculated to satisfy union objectives elsewhere" and therefore as secondary. The pressures here that were directed against the noncontracting employers may reasonably be viewed as having an object of forcing or requiring them either to bring houses into the Butte area with Article XXII work still to be done, or to cease bringing them in altogether. Either alternative would be a proscribed object. Accordingly, I find that by such pressures Respondent Carpenters has engaged in conduct violative of Section 8(b)(4)(i)(ii)(B) of the Act.[9]

[9] To the extent the Board's decision in *Bricklayers Local 8, (California Concrete Systems)*, 180 NLRB 43, appears inconsistent

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2. The allegation that entering into Article XXII was violative of Section 8(e) and Section 8(b)(4)(A)

The initial charges were limited to alleging violations of Sections 8(b)(4)(B) and 8(b)(4)(D) by conduct relating to the enforcement of Article XXII. The Section 8(e) and 8(b)(4)(A) charges filed by the Chamber were made at a considerably later date. The General Counsel and the charging parties urge that the record supports a finding that "entering into" a contract with Article XXII is violative of the latter two sections. The Carpenters regards the lawful nature of the clause itself as already resolved by the *Silver Bow* case. The Chamber considers the 8(e) and 8(b)(4)(A) violations as the central issue in this proceeding. The Chamber undertook to adduce considerable testimony both through experts, and by others, to support its contentions, and made an elaborate and able presentation in its brief on the issues.

The Chamber notes that the Supreme Court in *National Woodwork* stated that resolution of a work preservation issue "cannot be made without an inquiry into whether, under all the surrounding circumstances, the union's objective was preservation of work . . . or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." The Chamber argues that such inquiry is required because *National*

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with this, I regard the rationale expressed therein as having been superseded by the more fully expressed rationale in the *Koch* case. In *California Concrete Systems* the Board indicated that a union might lawfully picket a general contractor who had control of sending in the prefabricated item, even though precluded from picketing the contracting employer who did not have such control. Although the Board did not deal directly with pressures directed against a non-contracting employer in *Koch*, for reasons which have been set forth above, I view the more fully explicated rationale in *Koch* with regard to work preservation cases as superseding any seemingly contrary expressions in *California Concrete Systems*. I believe the view which I have adopted above to be more consistent with the *Koch* rationale.

Woodwork makes it clear that in sanctioning a work preservation clause, the Court is not insulating every contractual work restriction against an 8(e) ban. The underlying purpose of Sections 8(e) and 8(b)(4) is to limit the area of dispute to the primary disputants, and to avoid involving others therein, or disturbing business relationships a disputant may have with others. A work preservation clause, even where found lawful, necessarily has an incidental "cease doing business effect." This demands careful scrutiny of the "surrounding circumstances" whenever work preservation is claimed to make sure that the clause itself has a true work preservation object, and does not represent a subterfuge or a pretext covering an object elsewhere. The Chamber notes that in defining the "surrounding circumstances" the Supreme Court stated that such "might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." The Chamber contends that to approach the issue in any given case, we must evaluate a union's conduct by considering the foreseeable consequences of its demand. It is urged that in determining whether its efforts to obtain a work preservation clause are bona fide and not "tactically calculated elsewhere," the proper test is one that involves objective considerations and does not depend upon any subjective hope or desire of the union. The Chamber defines its objective test as "one which deduces an unlawful objective from the foreseeable impact of the union's conduct without regard to the union's subject belief or motivation in securing the clause." While the Chamber would not ignore subjective considerations, or any evidence relating to a union's expressed purpose in seeking a work preservation clause, it would not regard such considerations as controlling in the face of objective circumstances. Principal reliance would be placed on evidence relating to "the economic personality of the particular industry" and the "remoteness of the threat of displacement of the banned product or services. . . ." The

Chamber's claim in this regard is expressed in the following language from its brief:

> Incorporation of these criteria clearly manifests an intention that among "the circumstances" to be considered in determining the legality of such clauses is a relative assessment of the probable impact of the clause upon the industry targeted for boycott against the "threat of displacement [of workers' jobs] by the banned product or services." Thus, if the threatened impact on jobs is slight as compared with the substantial impact on the producing industry, the clause will be considered as "tactically calculated to satisfy union objectives elsewhere." Conversely, if the "foreseeable consequences of the [clause upon the industry] while disruptive [is] slight," but the threatened impact upon jobs is substantial, the clause will be considered "primary" absent other indicia demonstrating an ulterior, unlawful secondary object.

The Chamber interprets the term "surrounding circumstances" to cover an exceedingly broad spectrum which would not only cover the situation in the local Butte area, but also would embrace the construction industry in the United States as a whole. Evidence both from experts and others was received with regard to the Butte area and appears in the record in some detail. The undersigned, however, refused to receive detailed expert testimonial and documentary evidence relating to the national construction industry in the belief that studies relating to prefabricated houses and restrictive union practices generally, were not sufficiently closely related to the particular issues in this proceeding, and were more properly addressed to a legislative than to a judicial tribunal.[10]

[10] On April 25, 1974 the Chamber filed with the undersigned a motion for Leave to File Renewed Request to Administrative Law Judge to Reconsider Prior Rulings Rejecting Chamber's Exhibits 10(b) and 19. While such late request may properly be viewed as

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Before considering the contentions of the Chamber regarding the validity of its objective test we must first examine the assertions of Respondent Carpenters regarding its ostensible work preservation aims at the time it first voiced them and the posture of the case when the current charges arose.

The interest of Respondent Carpenters in possible problems arising from the entry of modular houses into the Butte area goes back to 1969 and the *Bender* case. The concern expressed by all union representatives in *Bender,* and in particular by Cadigan, clearly related to a fear that the arrival of fully built houses in the Butte area would diminish the amount of traditional craft work available to the Butte unions. Cadigan stated that in resisting the arrival of prebuilt houses, "we are protecting the work of the people we are representing." Interstate, the manufacturer involved in *Bender,* was nonunion, and while Cadigan and other union representatives made statements indicating an awareness of this, the nonunion status of Interstate's employees does not stand out as the real problem which prompted the pressures. The Board's findings as a whole make it clear that the thrust of the union objectives in *Bender* centered not on that fact, but on the fear of loss of work by local union members. As we have seen, the Board found the union pressures unlawful because they had an object of forcing or requiring the Butte contractors to cease doing business with Bender or requiring Bender to cease doing business with Interstate. Pressures brought against the contractors were deemed unlawful following the same theory upon which I have found similar pressures against the contractors to be unlawful in

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untimely, it has been fully considered by the undersigned. I am of the opinion that it raises nothing not heretofore fully considered that would serve to alter any of the findings herein or rulings heretofore made. Accordingly, although the request is granted to the extent of having given further reconsideration to the prior rulings, it is hereby denied insofar as receiving in evidence Exhibits 10(b) and 19 is concerned.

the instant case. I do not view the case as a holding, however, that in 1969, the Carpenters necessarily were engaged in pursuit of an object other than work preservation.

It was noted by the Board in *Bender* that at that time none of the unions involved had a work preservation clause in its collective bargaining contract. It is questionable that existence of such a clause would have affected the result, since the Board speaks of Bender as being "powerless to meet" the demands, and of the unions' using "proscribed means" to keep out the Interstate houses. Nevertheless, when Respondent Carpenters' contract came up for renewal shortly after the Board's decision in *Bender,* Respondent Carpenters deemed it desirable, and probably necessary, if it were to meet *National Woodwork* requirements, to negotiate a contract containing a work preservation clause. The Carpenters' three month strike for Article XXII was the subject matter of *Silver Bow.* The Carpenters' initial work preservation proposal in the negotiations was more extreme than that finally embodied in Article XXII. The Butte contractors had objected that the initial proposal would have the effect of preventing any modular houses whatsoever from entering the Butte area. The Board found Respondent Carpenters "consistently maintained that it was not interested in boycotting any product, including modular homes, whether union made or otherwise, but was only seeking to preserve the work historically and traditionally done by its member carpenters, employees of the contractor members. . . . " Objections were also made that initial proposals would even keep out "precut" items which had theretofore been accepted. The Board found Respondent Carpenters had disclaimed such an intent, and expressed its aim as only "to prevent further erosion of their members' unit work by the subcontracting of additional tasks currently and traditionally performed by the carpenters." Subsequently during the course of negotiations, Respondent Carpenters rejected a counterproposal of the Butte contractors limiting the application of the proposed work preservation

clause to situations where "the exclusive right to control the type of structure erected at the site of construction rests in a person, firm or corporation not a party to this agreement. . . . " It was following this that Article XXII in its present form was accepted. The Board made a further finding to the effect that representatives of four modular house manufacturers had signified that it would be possible for manufacturers to supply unfinished houses with the Article XXII work to be done at the jobsite. With one exception however, all the manufacturers signified they were disinterested in doing so. As we have seen, the Board found Article XXII to be lawful within the meaning of *National Woodwork,* stating among other things that the "fact that Respondent was willing to modify its original proposal to liberalize it in several respects, so long as its objective of work preservation was retained, demonstrated Respondent's good faith in seeking only work preservation as distinguished from tactical objectives elsewhere, including product boycotts." Admittedly, however, the Board was not confronted with a right to control situation since at the time no effort had been made to enforce the provisions of Article XXII.

The General Counsel and the charging parties assert in this proceeding that *Silver Bow* does not preclude further consideration regarding the validity of Article XXII. I would agree that the decision does not make the matter *res judicata* or create a collateral estoppel. The Silver Bow decision can scarcely be ignored altogether, however. The Board had before it the full text of Article XXII, the background against which it arose, and the negotiations which led to its acceptance. It is a fair assumption that the good faith aims of Respondent Carpenters as they existed at the time and the true object it pursued were fully litigated. The timing of the case, of course, prevented any consideration as to what effects, if any, later enforcement efforts would have, or any consideration of events which occurred subsequent to the litigation. I am satisfied, however, that it is a fair assumption that up to the time of the *Silver Bow* hearing,

Respondent's true object was pursuit of a work preservation aim, and that theretofore it had engaged in no conduct which can be construed to support a conclusion that in seeking an initially obtaining Article XXII, it was pursuing a proscribed object.

There remains the question of whether the picture changed when Respondent Carpenters commenced enforcement of Article XXII in a manner which heretofore I have found unlawful. Also whether other subsequent events or the application of an objective test demands a finding that maintaining and enforcing Article XXII constitute a new "entering into" that is unlawful.

The Chamber views Article XXII as having the foreseeable consequence of making it all but impossible to market Summit Valley and Boise Cascade houses in the Butte area. Without a means of constructing foundations and doing needed stitching, modular houses cannot be sold there. If Butte contractors are forbidden to do this work, the Butte area must be abandoned as a market unless the manufacturers are prepared to bring in unfinished houses conforming to Article XXII. They regard this as impractical and uneconomical. While this "cease doing business" effect is viewed as having a "substantial adverse impact on the producing industry," the Chamber recognizes that such might still be deemed an incidental effect of a true work preservation object. Thus the central thrust of the Chamber's claim is that an objective evaluation of other circumstances indicates that a "relative assessment" of this "substantial adverse impact" on the industry against the "threatened displacement [of workers' jobs]" by the advent of modular houses shows the likelihood of the displacement to be so slight that the true object is properly considered as "tactically calculated to satisfy union objectives elsewhere."

The Chamber notes the ostensible purpose of Article XXII is to preserve employment opportunities for carpenters. The Union pressing for it apparently views modular houses coming into the area as likely to cause a loss of such opportunities. This

conclusion rests on the assumption that the onsite work on a fully finished modular house requires fewer manhours by carpenters than the same house if stickbuild would require. Thus, an influx of modular houses into the Butte area is viewed as reducing the overall work left for carpenters, and Article XXII is addressed to obviating such a result. The Chamber challenges this line of reasoning as having no more than a superficial appeal, and claims that it actually rests on a false premise. To support this, the Chamber asserts that an objective economic analysis of the probable effects of the entry of modular houses does not show that in the long run carpenters' jobs will be reduced at all, but on the contrary, that such economic analysis establishes that the long-range result will be increased job opportunities not only for carpenters but also for workers in the Butte area generally. It is argued that a union pressing for Article XXII and responsible for the foreseeable consequences of its conduct, must be charged with responsibility of properly evaluating the economic effects of its conduct, and that, where such analysis shows jobs will not in fact be preserved, it is proper to infer that the union has an object "elsewhere."

Extensive testimonial and documentary evidence was received relating to the "relative assessment" issue and the "economic personality" of the industry. In substantial measure, this has been outlined above. In addition to evidence relating to the production of modular houses as contrasted with stickbuilt houses, the area labor relations history, and other matters, there is considerable testimony from experts and others relating to the housing needs in Butte, together with economic analyses of past employment in the area, and projections with regard to future employment. The Chamber pressed for the introduction of even more elaborate economic data which related to a variety of economic factors dealing with the construction industry nationally. Proffered expert testimony, which appeared to have a national orientation as contrasted

with a more direct relationship to the situation in the Butte area was rejected.[11]

[11] Horace J. DePodwin and Glenn Meyers, two highly qualified economists, had prepared studies of broad scope regarding the functioning of the construction industry in the United States as a whole. The principal study was entitled, "The Economic Personality of the Construction Industry and the Need for Technological Change." This was an elaborately documented and scholarly treatise dealing with such items as the severe national housing shortage attributable to rising construction costs, the shortage of skilled craftsmen available to meet construction needs, and the fact that many of these problems came about because the construction industry was an antiquated one resisting innovations and permitting restrictive work practices. The study suggests industrialized housing to be a factor of great promise in cost reduction, since it brings about a far more efficient utilization of the work force. The study goes on to supply data purporting to signify that such industrialization promises an extremely favorable effect upon employment in the building trades, noting that many unions have accepted this as a fact and are working toward it. DePodwin and Meyers find that so long as virtually all construction must be performed at the jobsite, growth of lowcost housing will be restricted, and that this will have an adverse effect upon the very workers who undertake to impose such restrictions. This study and the supportive testimony of the economists who had prepared it was rejected primarily because it was not believed necessary to evaluate economic considerations on so broad a spectrum in order to resolve the issues with which we are immediately concerned. It was further believed that to permit the introduction of such matters would needlessly expand the record in a manner not required to reach a decision on the issues. In addition, it was felt that in substantial measure, the economic data covered by this study was of a nature more appropriately directed to a legislative than to a judicial tribunal. For similar reasons, an additional paper entitled "A Theoretical Analysis of the Work Preservation Concept" prepared by the same economists, was also rejected. An interim appeal was taken from the undersigned's rejection of this proffered economic material. The ruling was initially sustained, but after the conclusion of the hearing, a motion for reconsideration of the ruling on the appeal was filed with the Board. This motion was denied. The Chamber in its brief now urges that I reconsider the matter, and reverse my earlier

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The factors in the record upon which the Chamber relies to support its so-called objective test include the following: (1) modular houses do not serve as a substitute for stickbuilt houses. There is an apparent demand for houses in the Butte area in the $18,000 to $25,000 price range, and it is impossible to market stickbuilt houses for less than $25,000. Therefore modular houses will not be competing with stickbuilt houses but will fulfill a market need not now being met; (2) some 100 modular houses came into the Butte area in the year immediately preceding the hearing. This represented some 30 percent of the houses built in the area. During the same period there was no slowing of unemployment among carpenters but, on the contrary, it appears there was a 20 percent increase of membership in the Carpenters; (3) the manufacture of modular houses brings a new industry to Butte, an area whose history shows relatively scant growth. The jobs in the new industry give added income to residents which should have a beneficial effect in creating jobs for construction workers and others. Adherence to restrictive practices would on the contrary eliminate such an industry and contract the job market; (4) general economic theory applicable to Butte and elsewhere shows resistance to technological change to be unfeasible and generally counterproductive in the long run with respect to employment expansion even among the group pressing for it; and finally, (5) the work preservation concept itself rests on faulty economic predicates and whether applied in the Butte area or

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position. After giving careful consideration to the record as a whole, and to the arguments of the Chamber, I am still satisfied that the economic data in the record relating to the Butte area alone which, it may be noted does not appear in conflict with the broader economic conclusions covered by the studies, suffices to meet the mandate of *National Woodwork* regarding "surrounding circumstances" and the "economic personality" of the industry. Accordingly, I reaffirm my rulings made at the hearing rejecting all evidence purporting to have a national scope.

elsewhere it will not increase productivity or employment opportunities.

While the Chamber regards these objective considerations alone as sufficient to support a finding of a proscribed object, it joins with the General Counsel in asserting that Carpenters' enforcement efforts and other conduct also evidence pursuit of such object.

The enforcement incidents have been described above, and I have found that directed as they were against contractors powerless to comply, or against others not in privity of contract, the means of enforcement sufficed to show a proscribed secondary object. We have seen, however, by the holding in *Koch* that such a result can be reached without invalidating a work preservation clause. In view of this I do not regard the unlawful enforcement means used here as *per se* tainting an otherwise lawful work preservation clause. This result would appear to follow with regard to enforcement pressures directed at either contracting or noncontracting employers since both were undertaken in pursuit of the same goal.

There remains the question, however, of whether, since the hearing in *Silver Bow,* Cadigan, or any other Carpenters' representative, conducted himself in a manner which might suggest an object other than work preservation.

Cadigan was specific and positive in his assertions that Carpenters at no time pursued any object but preservation of traditional jobsite work. He expressly denied interest in representing plant employees of either Summit Valley or Boise Cascade. Cadigan was a forthright witness, and I credit both of these assertions. I see nothing in his testimony suggesting real concern with the organizational status of either manufacturer. Both plants were organized, with the Boise Cascade plant employees represented by another local of Carpenters International. Cadigan's references to modular houses as "scab products" or as "unfair" came in a context of attempted

enforcement of Article XXII, and his approach as a whole appears keyed to getting the Article XXII work for the Butte carpenters with little concern for incidental effects this might produce. His references to these terms sound more in the nature of off-the-cuff remarks made in the common trade union vernacular than as expressions of a dual object. Considering the record as a whole I view Cadigan's general approach to Article XXII as evidencing a single-minded effort to further a sincerely held conviction that the advent of modular houses threatened employment opportunities of his carpenters.[12] I find no convincing evidence that in pursuing this course Cadigan was not acting in good faith, or that he was using such approach as a pretext to cover any other object.

3. Conclusionary findings as to violations of Sections 8(e) and 8(b)(4)(A)

The foregoing suggests that resolution of the 8(e) and 8(b)(4)(A) issues turns on an understanding of the true mandate of the Court when it directed an inquiry into the "surrounding circumstances." The Court is not specific on the question of "surrounding circumstances." The suggested considerations of "economic personality" or "threat of displacement" help but little, because the Court gives no real hint as to what these terms encompass. The Chamber seizes on these two terms as the key to its "objective test." It views the term "economic personality" as embracing a broad concept of economic theory which must be considered in evaluating construction industry problems. Consideration thereof leads it to a conclusion that resistance to technological advancement in the

[12] It may be noted that in the fall of 1972 Cadigan had good reason to believe both Article XXII and its enforcement might be lawful. The initial *Silver Bow* decision had issued. The Board had indicated that enforcement of such a clause against a contractor without the right to control work assignment was unlawful, but several Courts of Appeal had emphatically disagreed. Moreover, *Koch,* with its full explication of the Board's view, had not yet issued.

form of a work preservation clause like Article XXII would not only hinder economic progress, but also would not preserve the jobs at which it was aimed. It asserts that the record sustains a conclusion that this very result will be forthcoming in the Butte area should Article XXII be found lawful. The evidence relied upon to support this is the expert testimony of economists relating to such matters as general economic theory, Butte housing needs, Butte population growth, and carpenters' job experience in Butte during the preceding year.

Of necessity expert testimony of this nature is in some measure speculative, and involves educated guesses as to future developments. I am satisfied that the Chamber's experts are well qualified, and that their investigations, evaluations, and predictions relating to the effect of Article XXII and its enforcement are likely to be correct. Assuming this to be true, however, I am not convinced that Carpenters are properly charged with knowledge of this as a "foreseeable consequence" of its pursuit of an otherwise lawful work preservation object.

This objective test as a controlling factor can only be sustained if we are justified in charging any union seeking a work preservation clause with knowledge of its economic consequences. The dissenting justices in *National Woodwork* saw Congress as viewing any product boycott as producing undesirable economic consequences and thus all "cease doing business" situations to constitute proscribed objects. The majority, however, saw the matter differently, and permitted pursuit of a true work preservation object, at least where no control issue existed. The entire Court, however, was considering a product boycott problem. Efforts to outlaw product boycotts generally center on the theory that they are economically unsound, and in the long run will have an adverse economic effect even on the party who has been pressing for one. It is difficult to envisage any product boycott situation which could successfully sustain itself against this long range argument of adverse economic consequences. The Chamber's

test would charge a union with responsibility for knowing that adverse economic consequences would flow from its pursuit of a work preservation clause. The test would then say that, possessing such knowledge, continued pursuit of the clause could not be viewed as having the sole object of work preservation, since a union could not reasonably conclude that it would likely preserve jobs. Therefore, the union's object must be deemed as aimed elsewhere, and viewed as secondary and unlawful. This is an approach that would have the practical effect of making it all but impossible to pursue a work preservation object even of the limited nature permitted by the majority in *National Woodwork*. In substantial measure use of such an objective test would achieve the end found by the dissenting justices, but rejected by the majority. Moreover, regarding economic consequences the majority in *National Woodwork* spoke as follows:

> The Woodwork Manufacturers Associations, and amici who support its position, advance several reasons, grounded in economical and technological factors, why "will not handle" clauses should be invalid in all circumstances. Those arguments are addressed to the wrong branch of government. It may be "that the time has come for reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. . . ."

Accordingly, contrary to the claim of the Chamber I am satisfied that the Court's mandate is far more limited. The majority recognized that the inevitable "cease doing business" effect of its holding could lead to abuse. Therefore it directed careful scrutiny to insure that the lawful object was pursued in good faith. The nature of the industry, the setting in which the

dispute arose, the bargaining history, and various representations of union representatives were all "surrounding circumstances" that would throw light on the union's true object. Subterfuge or pretext might well be discerned from an examination of such factors. I am satisfied that the Court's mandate is thus limited, however, and that in any event it did not encompass an evaluation of the economic consequences in the manner urged by the Chamber.

In the instant case for reasons more fully set forth above I view neither the Carpenters' initial pursuit of Article XXII nor its subsequent "entering into" or enforcement efforts as sufficient to establish that the agreement itself has a proscribed object. Accordingly I find that it has not been established that "entering into" or maintaining Article XXII is conduct violative of Sections 8(e) and 8(b)(4)(A) of the Act, and I shall recommend that the allegations in this regard be dismissed.

It must be noted, however, that the foregoing holding is limited in scope. Nothing therein is to be construed as making Article XXII enforceable for all purposes. It is enforceable only in situations which parallel that in *National Woodwork* where the contracting employer has full control of the work assignment. In all other situations where the contracting employer is powerless to award the work, or the pressure is directed at a noncontracting employer or his employees, Carpenters may not press for Article XXII work within the rationale of the *Koch* case as set forth in the preceding section.

E. The Responsibility of Respondent Council for the Alleged Unlawful Conduct of Respondent Carpenters

As noted above, Respondent Council had not been charged with a violation of the Act prior to the issuance of the amended consolidated complaint in May 1973. The hearing opened on June 5, and after three days recessed until July 24. On July 9, the Chamber amended its charge, and on July 20, the General Counsel moved to amend the consolidated com-

plaint by alleging, in substance, that "on or about October 5, 1972" Respondent Council "acting at the behest of and as agent" of Respondent Carpenters, "threatened employer members of Butte Contractors Association . . . with a work stoppage if they continued to perform work on modular homes" manufactured by Summit Valley and Boise Cascade until each of these manufacturers signed contracts containing Article XXII. This conduct was claimed violative of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) because it was claimed to have the same proscribed objects as the pressures brought by Respondent Carpenters.

The motion to amend was argued on the record when the hearing reopened on July 24. Following argument, the undersigned denied the motion to amend, primarily because it appeared to serve no useful purpose since any remedy for the unlawful conduct of Respondent Carpenters would also enjoin persons acting as agents for the Carpenters or at its behest. Moreover, it appeared that joining the Council and litigating its responsibility at this point in the proceeding would have the effect of unduly prolonging the hearing. An interim appeal from denial of the motion to amend was entertained by the Board. On July 27, my ruling was reversed, and I was directed to grant the motion to amend. Thereafter, I ruled that Respondent Council, as a result of the amendment, became a full party to the proceeding entitled to time to answer, time to examine the record already made, and to recall and reexamine witnesses that had already appeared if their testimony related to the allegations against the Council. To effectuate such rights, the hearing was recessed from July 27 to September 12. Thereafter, Respondent Council filed an answer, appeared by its counsel when the hearing reconvened on September 12, and participated fully in all aspects of the proceeding until the hearing closed.

When the hearing reconvened, Respondent Council, among other things, voiced objections to proceeding based on

lack of due process. After extended argument on the record, these objections were ruled to be without merit. Due process objections were reiterated in Respondent Council's brief, filed after the close of the hearing. No purpose will be served by a detailed outline of such objections, or by discussion of each of the issues raised. Suffice it to say that a fair appraisal of the record including the time allowed, the opportunity afforded for examination of the previously made record, the granting of the right to recall witnesses, and the extent of actual participation in the remainder of the hearing, indicate that counsel was afforded a full opportunity to make its defense as to the allegations made against it. Under the circumstances, I find Respondent Council's objections, based on due process grounds, to be without merit.

The unlawful conduct charged against the Council relates only to a letter sent by the Council to certain contractors on October 5, 1972. Before considering the text of this letter, and the circumstances leading up to and following its sending, we must consider the nature of the Council itself and its relationship to Respondent Carpenters and the various construction industry unions that comprise its membership.

Respondent Council is an organization whose membership is comprised of the Butte area unions directly engaged in the building industry. It is affiliated with the Building and Construction Trades Department of the American Federation of Labor. The Council exists to protect the interests of the different trades represented, to serve as a forum to which the members can bring their individual problems, and to give its members aid and support in their organization and representation of employees where such is needed. Council membership in the Butte area includes some 15 unions. The Council is supported by a per capita tax paid by each affiliated union. The Council holds regular monthly meetings to which these unions send delegates. The delegates report their own individual problems at the meetings, participate in discussions thereof, and

in turn report back to their own unions what has been discussed at Council meetings and what, if any, action the Council membership had voted to undertake. In addition to functioning as a forum for discussion, Respondent Council will on occasion act on its own in pursuit of the interests of its members. The *Bender* case provides an illustration of the Council assisting members in a move to limit the entry of modular houses into the Butte area. As we have seen, the Council was joined as a party respondent in *Bender*, and the Board's cease and desist order ran against it as well as the member unions also named.

Ever since the *Bender* case, Council minutes reflect continuing discussions at Council meetings concerning various problems relating to the entry of modular houses into the Butte area. Frequently issues of this nature were brought up by delegates from the Carpenters. In the Council minutes of September 19, 1972, we find Cadigan reporting to the Council on problems he was having with Summit Valley at the time, and the minutes noting that the Carpenters "are fighting the methods they used here and ask support of" the Council. Thereafter, a motion was carried that the Council executive board meet on the matter as soon as possible. Minutes of executive board meetings of the Council are not kept, and it was not shown when, if at all, the executive board ever met or considered this problem of supporting the Carpenters in their dispute with Summit Valley.

On October 5, 1972, the Council sent out a letter written on its own letterhead and signed by Mitchell Mihailovich, president. This letter reads in full as follows:

NOTICE TO ALL CONTRACTORS:

Please be informed the Southwest Building Trades Council has taken action that its membership will not work on construction projects with personnel whose Inter-

national Union is not affiliated both locally and internationally with Building Trades Council, AFL-CIO.

This action pertains to onsite construction and will be in effect commencing October 16, 1972.

On the attached sheet are the unions who are affiliated both nationally and locally with the Building and Construction Trades Department, AFL-CIO.

The attached sheet lists the names of 15 unions represented as "nationally or locally" affiliated. The Teamsters is not such an affiliate, and its name is not on this list.

The General Counsel and the Charging Parties contend this letter to show that Respondent Carpenters had successfully enlisted the support of Respondent Council as its agent or ally in its fight to enforce Article XXII. It was noted that the letter was sent during the period when Respondent Carpenters had commenced steps to enforce Article XXII and after it had solicited Council support. As we have seen, Teamsters have a provision in its contract permitting Summit Valley employees to perform onsite work where necessary "to preserve and protect the integrity of the products manufactured." If the contractors were being prevented from performing the onsite foundation and stitching work, it was reasonable to assume this provision would be invoked, and that Summit Valley Teamster employees would be brought to the jobsite for such purposes. The letter and the omission of Teamsters from the "attached list" is thus regarded as a threat to contractors that on any jobsite where the "non-affiliated" Teamster employees might be called in to do the foundation and the stitching work, none of the other Council-affiliated crafts would work with them and the marketing of the Summit Valley houses would be hindered.

Respondent Council denies that this letter had anything whatsoever to do with the Carpenters or any other matter

relating to the Butte modular housing problem. According to Mihailovich, three of the local building trades unions, Asbestos Workers, Bricklayers, and Lathers, were at the time delinquent in their required per capita payments to Respondent Council. Mihailovich states that the letter was sent in part for the purpose of putting pressure on these delinquent unions to pay up their per capita tax and reinstate their local and national affiliation.[13] Mihailovich testified that the letter had an additional purpose which did relate to the Teamsters. The Teamsters, although not an affiliated Council member, was recognized as playing a role in the building trades industry. Mihailovich states that the Teamsters have the recognized jurisdiction to make all deliveries to jobsites. According to Mihailovich, however, on some of the larger jobsites, there will be truck driving limited to the jobsite alone which falls within the traditional jurisdiction of a craft working full time at the site. At about this time on some of the larger jobsites it had been reported that members of the Teamsters had been given full time jobsite driving. This was not deemed appropriate by the Council and Mihailovich asserts this was in part what the letter was protesting. It stands uncontradicted that the October 5 letter was sent only to four general contractors, each one of which was at work on a large construction project, not concerned with any aspect of residential construction. Mihailovich testified that he believed these four to be the only contractors at whose jobsite members of the delinquent unions were working, or the only ones with whom there were Teamster problems concerning onsite work.

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[13] In April 1972, the Council had sent letters to each of these three unions noting their delinquency and stating that, if they did not pay up, "the contractors . . . will be notified that the other crafts will no longer work with them." However, the names of all three of these unions appear on the October 5 "attached list," which would indicate that at that time each was regarded as affiliated. It was not shown that copies of the October 5 letter to the contractors were sent directly to these delinquent unions.

In any event, the October 5 letter triggered a series of events which for the most part add confusion to the question of its real purpose. It is not shown that the letter directly brought about any work stoppages at any Summit Valley or Boise Cascade modular house sites, or indeed that any of the contractors who might have been engaged in such work even saw it. However, at least one of the larger contractors who received the letter reacted immediately and strongly.

Arthur G. McKee and Co. was a contractor working on a large construction project for Anaconda Company. Noting that the Teamsters were not on the list of affiliates attached to the October 5 letter, he viewed it as a threat that Council affiliates would order their members to leave his job if he continued to use members of the Teamsters. McKee promptly sent a telegram to the Building and Construction Trades Department in Washington, D.C. with whom Respondent Council is affiliated. In this telegram, McKee signified that he did not know the reason behind the October 5 letter, stated that he wished to live up to his own obligations to all building trades unions, and urged that the Council's parent organization take whatever steps it could to resolve any existing problem in a manner which would avoid a work stoppage. No mention was made by McKee in this telegram of any problem involving modular housing. McKee's telegram seems to have had some initial effect since we find the following in the minutes of the regular meeting of Respondent Council on October 17, 1972:

> The letter concerning the Teamsters that was sent to the contractors was read and the telegram that McKee sent to the National Building Trades disputing this letter was also read. President Mihailovich reported we have been directed by the International to hold off on any action until they have a chance to check this out.

While the foregoing minute entry would seem to confirm that the October 5 letter related to the Teamsters, it is not inconsistent with the testimony of Mihailovich, nor does it necessarily signify that the Teamster problem involved modular housing rather than full time onsite driving. As described above, the Summit Valley picketing was commenced on October 12 and following the initial charges filed in this proceeding, such picketing and other coercive job action was enjoined by the District Court on November 8, 1972.

Although the McKee telegram had resulted in the Council's suspending any contemplated action, no meeting to resolve the issues, whatever they might be, relating to the October 5 letter took place until November 16. This meeting was held in Butte and was attended by a representative of the Building Trades Department, by International and Local representatives of the Teamsters, by local representatives of the Council, and by Cadigan of Respondent Carpenters. It is not clear to what, if any, extent the issues of dues delinquency or the Teamsters driving full time on jobsites were discussed among those present. The testimony of Cadigan, Mihailovich and Roberts, a Teamster representative, suggests the principal subject of discussion to have been whether Summit Valley employees would be permitted to follow houses to jobsites. Teamsters' representatives stated affirmatively that their union had no interest in doing onsite work on any Summit Valley modular house so long as the building trades unions would undertake to do all that was needed to make the house habitable. Teamsters signified, however, that, should Respondent Carpenters or any other building trades unions make it impossible for contractors to do this needed work, the Summit Valley employees would follow the houses to the jobsites and do what was needed to make them habitable. The injunction was in effect at the time and Carpenters were no longer able to pursue efforts to enforce Article XXII against contracting or noncontracting employers. Cadigan, however, did signify that Carpenters had no interest in representing employees at the Summit Valley plant. Although an attempt was made to work out a written under-

standing between the Teamsters and the Council, efforts in this direction proved unsuccessful, and the meeting ended on a somewhat inconclusive note.

The foregoing scarcely presents a pattern of clarity. Consideration of the entire picture, however, does not convince me that it has been fully established that the conduct of the Council was sufficiently related to the modular housing problem that it may be held responsible either as an agent or ally of Respondent Carpenters in pursuit of the latter's unlawful objectives.

A close relationship naturally exists between a building trades council and its affiliates. Ever since ***Bender*** modular housing had been viewed by the Butte building trades unions, and especially by the Carpenters, as a problem. Understandably there had been continued reporting and discussions of matters relating to it at Council meetings. However, by September, the legality of Article XXII appeared to be established in some measure, and the Carpenters had undertaken some enforcement effort against the contractors which appeared to have been successful. The support mentioned in the Council minutes of September 19 as having been sought by Carpenters is not defined, and the record does not disclose, that the executive board of the Council ever discussed or decided on a course of action before October 5. While it is reasonable to assume that Respondent Carpenters might welcome support efforts from the other crafts through the Council, especially if the Teamsters were to commence doing some of the jobsite work on the Summit Valley houses, the real question is whether it is appropriate on the record before us to view the October 5 letter as an instrument of such support.

The text of the letter leaves its purpose in some doubt. The General Counsel views it as aimed at adding the Council's "muscle" to the Article XXII enforcement efforts of Carpenters. However, if this be in fact its real purpose, why was it not specifically spelled out in the letter? Article XXII was viewed by

the Carpenters and the Council as lawful at the time. There is no other apparent reason why either should try to disguise any joint or several efforts to have its terms observed. If the letter were to have an impact commensurate with the purpose which the General Counsel and Charging Parties attribute to it, why does it make no mention of Article XXII and the Summit Valley-Teamster Contract as the focus of and the reason for the threatened action? The record provides no good answers to these questions, and the explanations offered by the Council as to the purposes of the October 5 letter only add to the confusion. Possibly those drafting the letter were inept inasmuch as it is equally true that the asserted purposes relating to per capita delinquencies or Teamsters onsite driving were not specifically spelled out either. The confusion even becomes compounded in some degree when we note that at the November 16 meeting, which admittedly had resulted from the October 5 letter, the discussion centered on the Teamsters-Summit Valley aspect of the problem, and dwelt but little on the per capita and onsite driving issues.

This might leave the whole issue of purpose balanced in doubt were it not for the uncontradicted fact that the letter was sent to only four contractors, no one of which was involved in residential housing, or would be likely at any time to become involved in a modular housing problem. Carpenters was pressing to make it impossible for Summit Valley houses to be marketed in the Butte area unless sent to jobsites in unfinished form. Carpenters could, and did, bring its own pressures against the Butte area contractors called upon to do needed carpentry work on Summit Valley's finished modular houses. The only contractors, however, who could possibly be affected would be those who undertook the sort of jobs required to make the Summit Valley houses habitable. Council support could expand these pressures against the same contractors. For the expanded pressure to be supportive, however, it had to be made known to those contractors who might engage in residen-

tial work of this nature. The October 5 letter was sent to none of them, but only to four larger contractors who apparently had no concern with residential housing whatsoever. This lends credence to the Council's assertion that despite the wording of the letter and despite any subsequent incongruities in the explanations, the letter was neither aimed at, nor intended to relate to the modular housing dispute and Carpenters' efforts to enforce Article XXII, and I so find.

Accordingly, I find that it has not been established by a preponderance of evidence that Respondent Council, acting either as agent or at the behest of Respondent Carpenters, sent the October 5 letter for any purpose relating to the modular housing dispute. I further find that, by such letter, Respondent Council did not threaten or coerce any contractor for any proscribed purpose within the meaning of Section 8(b)(4)(ii)(A) and (B) or Section 8(e). Therefore I shall recommend that the allegations against Respondent Council be dismissed.[14]

F. The Conduct Alleged as Violative of Section 8(b)(4)(D)

The charges in 19-CD-212, the circumstances surrounding the picketing of Summit Valley, the injunction, and the 10(k) hearing and its result, have been referred to above. The economic pressures have been found violative of Section 8(b)(4)(B). But there remains the question of whether such economic pressures shall also be regarded as violative of Section 8(b)(4)(D).

[14] On April 25 the Chamber moved for leave to file a reply brief on the issues relating to the Council's responsibility. The Rules and Regulations make no provision for reply briefs, and I would regard such request as untimely in any event. Nevertheless, I have read and considered the contents of the brief submitted and find nothing therein that would alter any findings or conclusions that I have made herein regarding the responsibility of the Council.

Following the 10(k) hearing, the Board in its Decision and Determination of Dispute issued on April 6, 1973,[15] ruled that there was "reasonable cause to believe that a violation of Section 8(b)(4)(D) had occurred, and that the dispute is properly before the Board for determination." The Board went on to hold that Teamsters were entitled to "the work of manufacturing or building of prebuilt or modular homes and other structures, including work necessary to make the structures habitable. . . ." Thereafter the General Counsel determined that Respondent Carpenters had not given an unequivocal indication of its intent to be bound by the Board's determination. Accordingly, the complaint before us was issued.

In the 10(k) determination the Board rejected Respondent Carpenters' claim that its pressures were exerted solely against Jovick, related solely to enforcement of Article XXII, and that no pressures were directed against Summit Valley to bring about a change in work assignment from Teamsters to Carpenters. With regard to the circumstances supporting its conclusion that there was reasonable cause to believe that a violation of Section 8(b)(4)(D) existed, the Board stated the following:

> Viewing the total circumstances of this case, we find that Carpenters' conduct went beyond merely attempting to enforce Article XXII against Jovick. By pulling Jovick's employees off the jobsite and threatening to picket [Summit Valley's] workmen if they followed their work to the jobsite and completed the work thereon, Carpenters, for all intents and purposes was preventing [Summit Valley] from delivering its product to its customers in salable condition. Only if [Summit Valley] drastically curtailed its inplant operations and delivered the components of each modular house to the jobsite so that Carpenters would then

[15] *Carpenters Local 112 (Summit Valley Industries, Inc.)* 202 NLRB No. 153.

do the work guaranteed by Article XXII, Section 3(a), in other words, reassign its plant work from Teamsters to Carpenters, would Carpenters remove pressure from [Summit Valley] and its sub-contractor, Jovick.

Corroborative of Carpenters' unlawful objective is the evidence of a more direct pressure placed on [Summit Valley] by Carpenters. The record clearly shows that Carpenters picketed [Summit Valley's] plant for the express purpose of effecting a reassignment of the prefabrication of the modular houses from workmen represented by Teamsters to workmen represented by Carpenters, either on the jobsite or in the plant. Cadigan in fact admitted that the picketing would have ceased had the inplant work been given to members of Carpenters. Furthermore, Cadigan testified that additional picketing and handbilling would take place if Teamsters insisted on following the work to the jobsite.

Respondent's letter to the Regional Director, which is quoted above, clearly does not signify an unequivocal intention upon the part of Carpenters to abandon the position taken by the Carpenters in the 10(k) proceeding and subsequently rejected by the Board. The Carpenters neither urged, nor does the record disclose, any newly discovered evidence which would indicate that there has been any change in circumstances or change of its position. Thus it appears that all matters relating to the work assignment question were previously considered and have been decided by the Board. Indeed, nowhere in its brief does Carpenters urge or argue to the contrary. Although Carpenters has asserted in this case that it has no interest in representing employees in the Summit Valley plant, it made a similar representation in the 10(k) proceeding, and thereafter, including the hearing in the instant case, has failed to assert without equivocation that picketing of either the plant or the houses at the jobsite will be altogether abandoned. It is well settled that where no newly discovered evidence is

adduced, matters considered at the 10(k) hearing are not to be relitigated and the result theretofore found by the Board controls.[16]

Accordingly I find that Respondent by its picketing, and other unlawful pressures against Summit Valley, for reasons set forth above and heretofore found by the Board to constitute reasonable cause to conclude the conduct unlawful, and its refusal to comply with the Board's Decision and Determination of Dispute, has engaged in conduct violative of Section 8(b)(4)(i)(ii)(D) of the Act.

IV. The Remedy

Having found that Respondent Carpenters have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 8(b)(4)(i)(ii)(D) of the Act, I shall recommend that it ceases and desists therefrom and takes certain affirmative action designed to effectuate the policies of the Act.

The Chamber urges that the nature of the violations calls for remedies that depart from those normally given. These would include a so-called "broad" cease and desist order, physical expungement of Article XXII, and widespread dissemination of the notice by having it read to members, mailed to contractors bound by Article XXII, and published in a local newspaper. In addition the Chamber urges recision of fines assessed for violations of Article XXII, or refunding if the fines had been collected, and restoration of union membership if expulsion has occurred.

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[16] *International Brotherhood of Electrical Workers, Local 3 (Mansfield Contracting Corporation)* 206 NLRB No. 84; *Bricklayers Local 1 (Shelby Marble and Tile Co.)* v. *N.L.R.B.*, 475 F.2d. 1116, 82 LRRM 2746 (D.C. Circuit, 1973).

The order will enjoin pressures against not only contractors who have been pressured to date, but also will enjoin pressures against all contractors and other persons whose connection with the modular housing industry might subject them to the effects of such conduct. Having found Article XXII lawful on its face, it, of course, cannot be expunged, but it has been made clear above that such holding is a limited one, and Article XXII enforcement efforts may be undertaken solely in situations where the contracting employer has control over work assignment.

I see no reason for departure from the usual posting practice with regard to the notice. The members will be sufficiently apprised of the holding thereby, and there is no reason to believe that they, or the local, will not abide by the requirements of the order. I have found that Carpenters sought Article XXII in good faith, and that at the time it undertook the enforcement efforts herein found to have had a proscribed object, Carpenters had some reason to believe such might be lawful. Carpenters has been enjoined from enforcement of Article XXII by court order since November 1972. It does not appear that the injunction had unusual dissemination, and it has not been shown that Carpenters or their members have not complied therewith, or that Summit Valley or Boise Cascade have been confronted with difficulties in marketing their houses in the Butte area during this period.

The record indicates that in some instances fines were imposed on union members for violations of Article XXII. It is not altogether clear if any such fines were collected after the injunction. In any event I shall recommend that such fines be rescinded, and the amounts be refunded if they have been collected. In addition if union membership has been denied for the same reason, I shall direct that it be restored.

Although I have found insufficient evidence to hold Respondent Council responsible, the record fully establishes its

function and the close relationship it has to Respondent Carpenters and the other building trades unions. The cease and desist order against Respondent Carpenters clearly prohibits it to use any persons as its agents or allies in carrying out any of the proscribed conduct, and to the extent it should undertake to do so, the order is to be construed as enforceable against such agents or allies.

Upon the basis of the entire record, I make the following:

Conclusions of Law

1. Respondent Carpenters and Respondent Council are, and have been at all times material to the issues in these proceedings labor organizations within the meaning of Section 2(5) of the Act.

2. Silver Bow Employers Association and Butte Contractors Association and their employer members, as well as any other parties who are signatory to a contract between Respondent and such associations, are each employers within the meaning of Section 2(2) of the Act, and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By a variety of economic pressures relating to enforcement of Article XXII of Respondent Carpenters' collective bargaining agreement which as found above were directed at contracting and noncontracting employers or their employees, Respondent Carpenters has engaged in conduct violative of Section 8(b)(4)(i)(ii)(B) of the Act.

4. By economic pressures including picketing directed at Summit Valley, as found above, Respondent has engaged in conduct violative of Section 8(b)(4)(D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. By entering into a contract containing Article XXII with Silver Bow Employers Association and Butte Contractors Association, Respondent Carpenters did not engage in conduct violative of Section 8(e) and Section 8(b)(4)(i)(ii)(A) of the Act.

7. By sending the letter of October 5 to certain contractors, Respondent Council did not engage in conduct violative of Section 8(b)(4)(ii)(A) or (B) or Section 8(e) of the Act.

Upon the basis of the entire record, the findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[17]

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any employee to refuse to work on, handle or transport any modular house, or threaten or coerce any person, including Butte area contractors or any other employer engaged in some aspect of constructing, transporting, or handling modular houses, where in either case an object of such pressures is to force or require the Butte area contractor, or any other person, to cease working on a modular house at a jobsite, either altogether, or unless and until such a house be brought to the jobsite in a condition which conforms to Article XXII of the contract; or where an object is to force or require the

[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

manufacturers of modular houses either to cease bringing such houses into the Butte area altogether, or to change their mode of operation so that such houses are brought to Butte area jobsites in a condition that conforms to Article XXII of the contract.

(b) Refusing to comply with the Board's Decision and Determination of Dispute by picketing, or other economic action, directed at Summit Valley, or any other person, where an object is to force or require Summit Valley to assign carpentry work, whether in-plant or onsite, to employees who are members of Respondent Carpenters, rather than to employees who are members of Teamsters.

2. Take the following affirmative action which I find to effectuate the policies of the Act:

(a) Post in conspicuous places at Respondent's business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 19 shall, after having been duly signed by Respondent Carpenters' authorized representatives, be posted by Respondent Carpenters immediately upon receipt thereof and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent Carpenters to insure that said notices are not altered, defaced or covered by any material.

[18] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Rescind any fines assessed, refund any fines collected and restore membership status in any case where union members have been penalized for engaging in conduct deemed by Respondent Carpenters to have been violative of Article XXII of its existing contract.

(c) Sign and mail sufficient copies of the notice to the aforesaid Regional Director for forwarding to any employer involved in the construction or transportation of modular houses destined for Butte area jobsites for posting by them, if they are willing, in all locations where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 19 in writing within 20 days from the date of this Order what steps Respondent Carpenters is taking to comply herewith.

It is further recommended that the allegations of the complaint alleging violations by Respondent Carpenters of Sections 8(e) and 8(b)(4)(i)(ii)(A) be dismissed, and that the allegations alleging violations by Respondent Council of Sections 8(e) and 8(b)(4)(ii)(A) and (B) be dismissed.

Dated: May 9, 1974

LOUIS S. PENFIELD

Louis S. Penfield
Administrative Law Judge

APPENDIX
NOTICE TO MEMBERS
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT induce or encourage any employee to refuse to work on, handle or transport any modular house, or threaten or coerce any person, including Butte area contractors, or any other employer engaged in some aspect of constructing, transporting, or handling modular houses, where in either case an object of such pressures is to force or require the Butte area contractors, or any other person, to cease working on a modular house at a jobsite, either altogether, or unless and until such house be brought to the jobsite in a condition which conforms to the requirements of Article XXII of the contract; or where an object is to force or require manufacturers of modular houses to cease bringing such houses into the Butte area altogether, or to change their mode of operation so that such houses are brought to Butte area jobsites in a condition that conforms to Article XXII of the contract.

WE WILL comply with the Board's Direction and Determination of Dispute on the work assignment issue, and will not picket or bring economic pressure against Summit Valley, or any other person, where an object is to force or require Summit Valley to assign carpentry work, whether in its plant or at a jobsite, to employees who are members of our union rather than to employees who are members of Teamsters Union Local No. 2.

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA, LOCAL 112,
AFL-CIO (Labor Organization)

Dated_____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. 10th Floor, Republic Building, 1511 Third Avenue, Seattle, WA 98101 Telephone: (206) 442-4532

ARTICLE XXII

SECTION 1. *Application.* The Employers are in the construction industry and both parties have elected to come under the proviso applicable to the construction industry contained in Title 29, Section 158(e) of the United States Code as amended.

SECTION 2. *Scope of the Foregoing.* Sections 1 and 3 of this Article relates to contracting or sub-contracting and work to be done at the site of the construction, alteration or repair of a building structure or other work.

SECTION 3. (A) All of the following work shall be performed at the site of construction, alteration, or repairing of the building structure or other work and shall not be sub-contracted off the job site, unless said work is done at the Employer's shop.

(1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.

(2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.

(3) The installation of all exterior trim on the structure, or in the alternative, all interior trim on the structure.

(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal, or composition material.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops. . . .

(9) The placing and fastening of all components of the structure upon the foundation.

(B) Nothing herein shall apply to any structures in the following situations:

(1) (Omitted)

(2) When the construction work done by the Employer at the site of a pre-assembled or pre-built single family dwelling consists of building independent structures such as garages or other structures that are not part of the unit itself.

(C) No Employer shall be discriminated against, nor be adversely affected by the Union, for accepting and completing any sub-contracted work that conforms to Paragraph A of this Article.

(D) Nothing herein shall be construed to restrict work by carpenters or contractors when pre-fabricated or pre-built components or construction not listed in Paragraph A are utilized, installed or assembled at the site of construction.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, AND HAROLD STOLLEY, STEWARD

and

J. L. SIMMONS COMPANY, INC.

Case 38—CC—50

SECOND SUPPLEMENTAL DECISION

On September 5, 1969, the National Labor Relations Board issued its original Decision and Order in the above-entitled proceeding,[1] finding that the Respondent Union had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, and ordering that the Union cease and desist therefrom and take certain affirmative action.

Thereafter, on April 6, 1971, the United States Court of Appeals for the District of Columbia issued its decision[2] in which it declined to enforce the Board's Order because, in the court's view, the Board's exclusive reliance on the "right-to-control" test in assessing the Union's conduct was impermissible. The court remanded the case to the Board for a new decision, "considering the union's objective 'under all the surrounding circumstances,' " and for further proceedings consistent with the court's opinion.

On January 5, 1973, the Board issued its Supplemental Decision and Order on remand,[3] affirming its original Decision, as it found, upon the totality of the record, that the Union's

[1] 178 NLRB 351.
[2] 444 F.2d 895.
[3] 201 NLRB 70.

conduct was tactically calculated to satisfy union objectives elsewhere and, therefore, that the Act had been violated, as alleged.

Thereafter, on March 4, 1976, the court denied enforcement of the Board's Order[4] on the ground that its conclusions were not supported by substantial evidence in that the right-to-control factor again appeared to have played a decisive role in the Board's Decision. The court also observed that the Board did not comment upon the significance of the Union's willingness to accept premium pay as a condition for installing the premachined plastic-clad doors it otherwise refused to allow its members to hang. In the court's view, this willingness undercut the Board's conclusion that the Union's conduct was directed toward secondary objectives. The court therefore remanded the case to the Board for dismissal of the complaint alleging unlawful conduct.

On February 22, 1977, the Supreme Court of the United States issued its decision in the *Enterprise* case[5] in which it upheld the validity of the Board's right-to-control test as a determinative factor in ascertaining whether a union's conduct was proscribed by Section 8(b)(4)(B) of the Act. Accordingly, on March 7, 1977, the Supreme Court granted the petitions for writs of certiorari in the instant proceeding, vacated the judgment below,[6] and remanded the case to the court of appeals for further consideration in light of its decision in *Enterprise*.

Thereafter, the Board filed an unopposed motion requesting that the court of appeals remand this proceeding to the Board for further consideration on the grounds, *inter alia*, that the aforesaid court, in its most recent decision herein, found this

[4] 533 F.2d 683.
[5] *N.L.R.B.* v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity. Local Union No. 638.* 429 U.S. 507.
[6] See fn. 4, *supra.*

case distinguishable from *Enterprise* in that the Union here involved, after striking for the work in controversy, was willing to accept a premium pay settlement and, further, that the Board did not have the opportunity to consider this possible basis for distinction, either in the light of the circuit court's reasoning or the Supreme Court's subsequent decision in *Enterprise.* On May 16, 1977, the court of appeals granted the Board's motion and remanded this case to the Board.

Pursuant to said remand, the Board invited the parties to file statements of position with respect to the issues raised. Such statements have been filed by the General Counsel, the Charging Party, the Respondent Union, and Associated General Contractors of America, Inc., as *amicus curiae.*

The Board has reviewed further the entire record in this proceeding, including the statements of position, and, on the facts and for the reasons hereinafter set forth, has decided to affirm its original Decision and Order.

The controversy in this case arose after the Simmons Company entered into an agreement with the Decatur and Macon County Hospital Association calling for the enlargement of the latter's existing hospital facility at Decatur, Illinois. Contract specifications required, among other things, the installation of plastic-faced doors which were to be guaranteed for the life of the building. These specifications prohibited the cutting, routing, trimming, or mortising of the doors after their shipment from the manufacturer's plant and also provided that doors requiring modifications were to be returned to the factory for that purpose. Simmons was bound by the agreement to submit to the Association both the name of the intended door manufacturer and detailed shop drawings for prior review and approval. Simmons ordered the required doors from the Anderson Wood Products Company, which conditioned its lifetime guarantee upon their being "premachined" at its factory where it had exclusive control over materials and workmanship.

Shortly after the first shipment of doors arrived at the hospital project, the Respondent's business representative, John Foreman, accompanied by the steward, Harry Stolley, met with Vice President Robert Neal of Simmons. At the meeting, Foreman protested that the use of these doors would result in a diminution of work at the site of construction, otherwise available to the carpenters. Foreman insisted that the objectionable doors be replaced by laminated "slabs," that is, unfinished doors which are fitted and prepared for hardware at the project site. He also warned Neal that the Union would not allow its members to hang the Anderson doors for Simmons or permit any other contractor to do so. Neal, on his part, advised Foreman that the Simmons Company was bound by the terms of its agreement to install the premachined doors and was, therefore, without the legal right to substitute doors more acceptable to the Union. The matter was not resolved.

Thereafter, Stolley refused to allow the carpenters to hang the disputed doors. Simmons' attorney, Paul Gebhard, telephoned Bernard Mamet, counsel for the Union, in an effort to resolve the controversy. Mamet suggested that the parties might negotiate the payment of a wage premium for each precut door installed, but otherwise declared that it was the policy of both the Respondent Local and its International not to allow their members to install precut doors.

It is this attempt on the part of the Union to obtain premium pay for installing the offending doors, as an alternative to barring their use on the project in favor of unfinished doors yielding more work opportunities for carpenters, which, it is suggested, distinguishes this case from *Enterprise* and absolves the Union from the consequences of its otherwise unlawful conduct. We disagree.

As in *Enterprise,* when the Union pressured Simmons with the declared objective of causing a substitution of unfinished doors for those required by the contract specifications, the

Union drew Simmons into a controversy it had no power to resolve.[7] Only if the *Hospital Association* were to change its job specifications and permit use of unfinished doors, providing additional work opportunities, could the Union combat the diminution of its claimed traditional work. Thus, in reality, pressure exerted on Simmons was for the purpose of forcing the Hospital Association to change its manner of doing business or forcing Simmons to terminate its contract with the Hospital Association. In such circumstances, the Union's conduct was, as previously stated, "at least in some measure 'tactically calculated to satisfy union objectives elsewhere'" and therefore proscribed by Section 8(b)(4)(B) of the Act.

Consideration of the Union's subsequent premium pay proposal does not cause us to reach a different result. In the first place, there is no evidence that the Union at any time abandoned its objective of keeping precut doors off the construction project by pressuring Simmons in the expectation that it could thereby force the Hospital Association to change its manner of doing business or force Simmons to terminate its contract with the Association. Further, the proposal itself is coercive in that it either penalizes Simmons for continuing to do business with the Hospital Association in accordance with their agreement, by having to absorb premium pay costs, or forces Simmons to seek contract renegotiation, with its inherently coercive impact, in order to avoid such additional costs. We therefore view the premium pay proposal as no more than a substitution of one form of economic pressure for another,

[7] There is no evidence in this case that Simmons' inability to resolve the controversy here involved stemmed from any act or omission on its part which would remove the Company from the Act's protection. See *Local Union No. 438, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, et al. (George Koch Sons, Inc.)*, 201 NLRB 59, 64 (1973); *Painters District Council No. 20 of Westchester and Putnam Counties, New York (Uni-Coat Spray Painting, Inc.)*, 185 NLRB 930 (1970).

undertaken with at least one objective which remains constant; namely, to influence the Hospital Association by inducing Simmons to cease doing business with it.

Even if we were to assume, *arguendo*, that the Union has unequivocally abandoned its boycott of the doors in question, we would not find that the demand for premium pay immunizes the Union's conduct against the reach of Section 8(b)(4)(B) of the Act. This controversy did not arise in the context of collective bargaining over the terms of a new agreement.[8] Indeed, neither Simmons nor the Union has the authority to modify the terms and conditions of employment as set forth in the collective-bargaining agreement to which they are bound. This dispute, involving job displacement caused by changes in industrial practice, was triggered by a product selection which only the Hospital Association had the power to make. The Union's concern is not over higher wages generally, a matter encompassed within the employment relationship between Simmons and its employees, but rather relates to matters over which Simmons has no control. In this context, Simmons remains a neutral.

The fact that Simmons could itself satisfy the demand for premium pay made by the Union in response to a loss of work opportunities does not serve to convert Simmons' status from a neutral to that of a primary employer. To view this controversy in such a light would require that we ignore the entire context in which it arose and obliterate the primary-secondary dichotomy on which the relevant provisions of the Act are based. The dispute herein is over *loss* of work, which Simmons, the

[8] In finding a violation of Sec. 8(b)(4)(B), Chairman Fanning relies specifically on the fact that the Union's demand for premium pay in return for installing the boycotted doors sought compensation above that provided for in the existing collective-bargaining agreement. Chairman Fanning does not understand this case to decide the legality of a union's seeking, during negotiations for a new collective-bargaining agreement, a contractual provision providing for premium pay in return for a union's handling or installing a boycotted product.

pressured employer, has no power to remedy. Likewise, the fact that premium pay, a form of compensation for work lost, would benefit Simmons' employees does not serve to convert Simmons' status to that of a primary employer; such a standard would do violence to the primary-secondary distinction set forth in *National Woodwork*[9] and has been specifically repudiated by the Supreme Court in *Enterprise*.[10]

In sum, after careful reexamination of all the circumstances in this case, we hereby reaffirm our original Decision and Order herein, holding that the Union's conduct as set forth above, including the demand it made on Simmons for premium pay as a *quid pro quo* for hanging the offending doors, was tactically calculated to satisfy union objectives elsewhere and therefore violated Section 8(b)(4)(B) of the Act.

Dated, Washington, D.C. August 15, 1978

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

[10] 429 U.S. at 528, fn. 16.

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, ("Act"), as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing, in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, and primary strike or primary picketing . . . (29 U.S.C. § 158(b)(4)(A) and (B)).

* * *

Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or

refrains or agrees to cease to refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void; Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the term "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception. (29 U.S.C., § 158(e)).

The relevant provisions of Section 8(b) the Administrative Procedure Act, as amended (80 Stat. 387, 5 U.S.C., §§ 500 *et seq.*) are as follows:

> (c)[T]he record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> > (A) finding and conclusions, and the reason or basis therefor, on all the material issues of fact, law, or discretion presented on the record; . . . (5 U.S.C. § 557(c)).

Supreme Court, U.S.
FILED
NOV 2 1978
MICHAEL RODAK, JR., CLERK

No. 78-326

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FOR AND ON BEHALF OF ITS MEMBER, BOISE CASCADE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 574 F.2d 457. The decision and order of the National Labor Relations Board (Pet. App. 14a-103a) are reported at 217 N.L.R.B. 902.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1978. The order of the court of appeals (Pet. App. 1a) denying rehearing was entered on May 4, 1978. On July

[1]Petitioner was a charging party before the Board and a party in the court of appeals (Pet. App. 3a, 26a).

28, 1978, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including August 25, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a work preservation clause in a collective bargaining agreement, lawful at the outset, becomes an unlawful secondary agreement under Section 8(e) of the National Labor Relations Act if the union engages in secondary activity that violates Section 8(b)(4)(B) of the Act.

2. Whether substantial evidence supports the Board's finding that the Building Trades Council did not assist the Union in violating Section 8(b)(4)(B) of the Act.

3. Whether the Board was reasonable in rejecting petitioner's request for extraordinary remedies for the Union's violations of Section 8(b)(4)(B) of the Act.

STATEMENT

1. For many years the Union[2] and some 50 contractors[3] in the Butte, Montana, area who employ carpenters have had a collective bargaining relationship (Pet. App. 34a). During the 1971 contract negotiations, the Union proposed a work preservation clause for the purpose of protecting the jobs of its members against the diminution that they expected to occur if fully prebuilt houses were

[2]United Brotherhood of Carpenters and Joiners of America, Local Union No. 112, AFL-CIO.

[3]The contractors bargained through the Butte Contractors Association and the Silver Bow Employers Association (Pet. App. 36a n.1).

brought into the Butte area. The contractors resisted the clause and a strike ensued, which lasted for 90 days. The contractors and Union ultimately reached an agreement (Pet. App. 36a-37a). Article XXII of the new collective bargaining agreement permitted carpenters to work on prefabricated houses delivered to a jobsite with either the "exterior siding or finishing" or "all wallboards and/or paneling" left off.[4] It required the house to be delivered with either "all exterior trim" or "all interior trim" left off. Article XXII also provided that the installation of all interior doors, the shingling of all roofs, the installation of all cabinets and shelving, and certain other work, including "the placing and fastening of all components of the structure upon the foundation," must be performed by jobsite carpenters (Pet. App. 39a-40a).

In an earlier case, *United Brotherhood of Carpenters, Local No. 112 (Silver Bow Employers' Association)*, 200 N.L.R.B. 205 (1972), the Board found that the purpose of Article XXII was "solely to preserve work traditionally performed by [Union] members and that [its] effect upon the use by contractor-members of modular homes, whether union-built or otherwise, was purely incidental" to that primary objective (*id.* at 209). Accordingly, the Board dismissed a complaint alleging that the clause violated Section 8(e) of the Act, 29 U.S.C. 158(e).

The present case arises out of the Union's efforts to enforce Article XXII. The evidence showed that Union representative Cadigan ordered employees of three contractors who were signatories to the agreement containing Article XXII to cease working on modular or prefabricated homes manufactured by Summit Valley or

[4]The text of Article XXII is set forth at Pet. App. 37a-38a.

Boise Cascade; these homes arrived at the jobsite more fully finished than the specifications of that clause permitted. In each of these instances, the contractors had been hired to install particular houses and did not have the right to control the specifications (Pet. App. 44a-47a).

Cadigan also attempted to force Reed Lemmons (a house-mover under contract with Boise Cascade) and Jack McLeod (a franchise dealer for Boise Cascade) to cease working on or dealing in Boise Cascade homes because they did not comply with Article XXII, and to compel McLeod to sign the Union's contract (Pet. App. 47a-49a). Cadigan induced two of Boise Cascade's own employees not to work on installation of a Boise Cascade house in Butte because Boise Cascade was not a signatory to the Union's contract (Pet. App. 49a-50a).

When Summit Valley, on request from one of its customers, sought to install its houses itself, using its own employees—who were represented by a Teamsters local union, and whose contract provided for installation work—the Union picketed a Summit Valley model home with signs stating that carpenters had not been employed in constructing the building (Pet. App. 50a-52a).[5]

2. The Board concluded that the Union violated Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), by inducing the employees of the three contractors who were signatories

[5]Summit Valley filed charges alleging that the Union was violating Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D), by attempting to force Summit Valley to reassign modular home work from the Teamsters to the Union. The Board determined the jurisdictional dispute in favor of the Teamsters. *United Brotherhood of Carpenters, etc. (Summit Valley Industries, Inc.)*, 202 N.L.R.B. 974 (1973). The Union, although assuring the Board that it would not require Summit Valley to assign work in violation of its Teamsters contract, reserved the right "to truthfully advise the public, whether by picketing or other publicity, that the Summit Valley Industries, Inc., does not employ members of, or have a contract with the [Union]" (Pet. App. 50a-52a).

to the Union's contract to cease working on the modular homes, and by exerting pressure against Lemmons, McLeod, Boise Cascade, and Summit Valley to cease bringing those homes into the Butte area. Even assuming that the Union had a work preservation object, the Board found, it also had a secondary object forbidden by Section 8(b)(4)(B) because the three contractors did not have the right to control the work in question, and the other persons never had a contract or collective bargaining relationship with the Union covering their employees (Pet. App. 66a-69a). The Board also concluded that the Union violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D), by failing unequivocally to discontinue picketing designed to achieve a reassignment of the work assigned to Summit's Teamsters-represented employees (Pet. App. 94a-97a).

The Board dismissed the complaint insofar as it alleged that Article XXII of the Union's contract and its maintenance violated Sections 8(e) and 8(b)(4)(A) of the Act (Pet. App. 84a).[6] The Board concluded that Article XXII, which it previously had found to be a lawful work preservation clause, was not transformed into an unlawful secondary agreement merely because the Union had sought to enforce the clause in situations where it had no legal right to do so (Pet. App. 80a). The Board, crediting the testimony of Union representative Cadigan, found that the Union did not have any "concern with the organizational status" of Boise Cascade or Summit Valley, and that the Union's "general approach to Article XXII [evidenced] a single-minded effort to further a sincerely held conviction that the advent of modular

[6]Member Kennedy dissented from this dismissal (Pet. App. 16a-23a).

houses threatened employment opportunities of [its] carpenters" (Pet. App. 80a-81a).[7]

Finally, the Board concluded that the Southwestern Building Trades Council of Montana, of which the Union was a member, did not assist the Union in its violations of Section 8(b)(4)(B) of the Act. The Board found that a letter sent by the Council—the sole evidence presented to prove the Council's complicity—was sent only to four employers not involved in the "modular housing dispute" (Pet. App. 87a-88a, 93a-94a).

The Board ordered the Union to cease and desist from the unfair labor practices found, to rescind any fines or other discipline that had been imposed on Union members in furtherance of the Union's unlawful secondary activity, and to post and prepare for mailing appropriate notices of compliance (Pet. App. 100a-102a). The Board declined petitioner's request for additional remedies (Pet. App. 97a-98a).

The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. 2a-13a).

ARGUMENT

1. A. In *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), Frouge, a general contractor, was party to a collective bargaining agreement with the union which provided that its employees would not be required to handle doors that had been finished off the jobsite. The employees struck when Frouge nevertheless ordered such doors, which it was not required to do by its contract with the project

[7]The Board observed that, at the time the Union sought to enforce Article XXII against contractors who did not have the "right to control" the disputed work, the legitimacy of its action was supported by several decisions of the courts of appeals (Pet. App. 81a n. 12, 98a).

owner. This Court concluded that determination whether the "will not handle" clause of the collective agreement, and its enforcement, were unlawful "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's object was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644). Applying this test, the Court held that the objective of the "will not handle" clause "was preservation of work traditionally performed by the jobsite carpenters," making the clause itself a lawful work preservation agreement.

In *NLRB* v. *Enterprise Association*, 429 U.S. 507 (1977), the union entered into a work preservation clause that was valid under *National Woodwork*. It then brought pressure to bear against Hudik, a contractor-signatory to the clause who, unlike Frouge, did not have the right to control the work sought by the union. Rejecting the union's contention that its pressure against Hudik was authorized by the work preservation clause, the Court stated: "Even though a work preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by §8(b)(4)(B)" (429 U.S. at 521 n.8).

National Woodwork and *Enterprise* together demonstrate that the lawfulness of a work preservation clause depends on "whether, under all the surrounding circumstances, the Union's object was preservation of work" for the employees covered by the agreement (386 U.S. at 644), but that lawful clauses may not be enforced with a secondary objective. Unlawful enforcement of a lawful clause, however, does not render the clause itself unlawful. The Board properly applied those principles here.

Given the evidence before it in *Silver Bow, supra*, 200 N.L.R.B. at 206-210, the Board was warranted in finding that Article XXII, when negotiated, was intended merely to preserve the work historically and traditionally done by employees of the Butte contractors. Moreover, substantial evidence supports the Board's finding that the Union's subsequent violations of Section 8(b)(4)(B) did not negate the work preservation objective that Article XXII was intended to serve and still serves when properly enforced (see Pet. App. 74a-76a, 80a-81a).

B. Petitioner is wrong in contending (Pet. 20-21) that the court of appeals rejected the "foreseeable consequences" test of *NLRB* v. *Local 825, Operating Engineers (Burns and Roe, Inc.)*, 400 U.S. 297 (1971), by stating that "[b]ecause the union miscalculates the circumstances under which it can act to enforce the clause, it does not render the clause invalid" (Pet. App. 9a). *Burns and Roe* merely holds that where the union engages in "flagrant secondary conduct" (*id.* at 305), it is charged with foreseeing that its conduct would sufficiently disrupt business relationships to be unlawful under Section 8(b)(4)(B). That decision has no bearing on the different question presented here—whether an otherwise lawful work preservation clause is converted into a secondary agreement because the union mistakenly has applied it in an unlawful manner.[8] The fact that, under

[8]Nor did the court of appeals fail to follow the "all the surrounding circumstances" test enunciated in *National Woodwork* in holding that the Board did not err in refusing to admit into evidence studies on the economic conditions of the modular housing industry (Pet. 24-26). The administrative law judge, whose findings were adopted by the Board, received extensive evidence from experts and others with regard to the Butte area but excluded evidence relating to the national construction industry on the ground that "studies relating to prefabricated houses and restrictive union practices generally, were

some circumstances, "the express terms and the application of Article XXII" may have precluded "the introduction of modular housing in the Butte area" (Pet. 21), does not establish that the clause violated Section 8(e). "Some disruption of business relationships is the necessary consequence of the purest form of primary activity." *Burns and Roe, supra*, 400 U.S. at 304.

C. Petitioner's reliance (Pet. 9-12) on *Connell Construction Company* v. *Plumbers Local 100*, 421 U.S. 616 (1975), is unwarranted. In *Connell* the union entered into an agreement with Connell—a general contractor—which required Connell to subcontract plumbing work only to employers who were signatories to the union's collective bargaining agreement. The union did not represent any of Connell's employees, and therefore the agreement could not be justified as a lawful work preservation agreement; the agreement was clearly secondary, and the only question was whether the "construction industry proviso" to Section 8(e) created some defense to antitrust liability.[9] The Court held that the agreement did not serve the purpose of the proviso—the avoidance of friction between union and non-union workers on the same job-site—because it was not limited to jobsites on which Local 100's members were working. Moreover, to sanction the agreement would permit "top-down" organizing—a result contrary to the entire thrust of the 1959 amendments to

not sufficiently closely related to the particular issues in this proceeding * * *." (Pet. App. 72a; see also *id.* at 77a-80a). This was an allowable judgment. Cf. Fed. R. Evid. 401 and 403.

[9]The proviso exempts from the prohibition of Section 8(e) "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work."

the Act, of which Section 8(e) was a part—because Local 100 did not represent or seek to represent Connell's employees (421 U.S. at 631-633). These considerations do not apply to Article XXII of the agreement involved here, for the Union entered into an agreement with employers whose employees it represented, and the purpose of Article XXII was to protect the work opportunities of the employees whom it represented. To be sure, in some instances, the Union applied the agreement in an unlawful secondary manner, but that does not sap Article XX11 of an possible lawful applications.

2. Petitioner contends (Pet. 26-28) that, even if the work preservation clause is valid under *National Woodwork*, this case presents a "timely opportunity to reconsider the work preservation doctrine in light of the abuses portrayed in this case." Petitioner argues that the work preservation clause threatens a "total exclusion from [the] market" (Pet 27) of prefabricated housing. That contention is unfounded. It ignores the fact—vividly shown by the record of this case—that purchasers of prefabricated homes often order them in finished form (Pet. App. 32a, 47a). In such circumstances, the Board's order makes clear that the work preservation clause may not be enforced by the Union to restrict the freedom of choice of the purchaser (Pet. App. 84a):

> Nothing [in this order] is to be construed as making Article XXII enforceable for all purposes. It is enforceable only in situations which parallel that in *National Woodwork* where the contracting employer has full control of the work assignment. In all other situations where the contracting employer is powerless to award the work, or the pressure is directed at a noncontracting employer or his employees, Carpenters may not press for Article XXII work * * *.

Thus, the Union may not enforce the clause to prevent erection of prefabricated houses where purchasers, rather than contractors, make the decision to order such houses in finished form (see Pet. App. 66a-69a).

3. Petitioner's contention (Pet. 21-22) that the Board erred in failing to find that the Council assisted the Union in its unlawful Section 8(b)(4)(B) activity, and therefore also violated that Section, raises only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23. In any event, the record supports the Board's conclusion that the only evidence presented to support the alleged Council violation—a letter sent to four contractors not involved in the modular-housing dispute—failed to show that the Council had any connection with the illegal secondary activities. See page 6, *supra*.

4. Petitioner's final contention (Pet. 22-24)—that the court of appeals should not have sustained the Board's decision not to grant extraordinary remedies in light of the Board's asserted failure to explain its rejection of those remedies—likewise presents no issue warranting review by this Court. There is no factual foundation for petitioner's argument. The Board not only explicitly acknowledged petitioner's request but also explained in

detail its reasons for denying it (Pet. App. 97a-98a).[10] The selection of remedies under the Act is "a broad discretionary one * * * for the Board to wield, not for the courts" because "the relation of remedy to policy is peculiarly a matter for administrative competence." *NLRB* v. *Seven-Up Co.*, 344 U.S. 344, 346, 349 (1953). See also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969). For the reasons detailed in note 10, *supra*, and because petitioner's request for additional remedies was premised in part on alleged violations of the Act that were not found by the Board, the Board acted within its discretion in selecting customary remedies for the violations that it found.

---

[10]The Board rejected petitioner's request for "widespread dissemination of the notice by having it read to members, mailed to contractors bound by Article XXII, and published in a local newspaper" (Pet. App. 97a). The Board explained that the normal posting of notices "in conspicuous places at [the Union's] business offices, meeting halls, and all other places where notices to members are customarily posted" (*id.* at 101a) was sufficient because (*id.* at 98a):

> The members will be sufficiently apprised of the holding thereby, and there is no reason to believe that they, or the local, will not abide by the requirements of the order.* * * [The Union] has been enjoined from enforcement of Article XXII by court order since November 1972. It does not appear that the injunction had unusual dissemination, and it has not been shown that [the Union] or their members have not complied therewith, or that Summit Valley or Boise Cascade have been confronted with difficulties in marketing their houses in the Butte area during this period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 78-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, for and on behalf of its member, BOISE CASCADE CORPORATION, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents*.

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit.

RESPONSE TO BRIEF IN OPPOSITION.

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vs.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents.*

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit.

RESPONSE TO BRIEF IN OPPOSITION.

I. Contrary to the Government's Opposition, the *National Woodwork*[1] "All The Surrounding Circumstances" Test Requires Pre- and Post-Entry Union Conduct and the Economic Consequences of a Purported Work Preservation Clause To Be Considered In Order To Determine Whether § 8(e) of the Labor Act[2] Has Been Violated.

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[1] *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612, 644 (1967) (herein referred to as "*National Woodwork*").

[2] National Labor Relations Act ("Act"), 29 U.S.C. §§ 158(e).

A. ***The "all the surrounding circumstances" test is misapplied where a purported work preservation clause is held valid on its face under § 8(e), notwithstanding separate NLRB decisions holding that the Union's pre-entry and post-entry conduct violated § 8(b)(4)(B).***

The Board's decision and the Government's opposition separate §§ 8(b)(4)(B) and 8(e) and assert that a purported work preservation clause which has no express secondary objective does not violate § 8(e), irrespective of the Union's and the Council's pre- and post-entry conduct, the economic consequences of the application of the clause, and § 8(e)'s proscription against implied agreements.[3]

The respondents' efforts to keep modular homes out of the local housing market has been the subject of three separate cases. Prior to the adoption of Article XXII (the purported work preservation clause), respondents exerted secondary pressure against a modular home dealer and its customers. In the *Bender* case,[4] the Board held that the labor organizations' alleged work preservation object did not insulate their illegal pressures to keep modular housing out of the Butte market, but suggested that the same secondary objectives might be achieved through the negotiation of a work preservation clause with local

[3] Section 8(e) states in part that

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express *or implied*, whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement . . . contained in such an agreement shall be to such extent unenforceable and void . . . ." (29 U.S.C., § 158(e)). (Emphasis added.)

[4] *Southwestern Building Trades Council of Montana, et al.* (John A. Bender), 188 NLRB 224 (1971) (hereafter referred to as "*Bender*").

contractors.[5] Shortly after the *Bender* decision was rendered, the respondents accepted the Board's suggestion to pursue a work preservation clause when the collective bargaining agreement was next reopened. A three-month strike to force the acceptance of Article XXII in the collective bargaining agreement ensued. (Pet. App. 37a and 104a).[6]

Immediately following the three-month strike over the inclusion of the work preservation clause, the contractors

[5] The Board in the *Bender* case suggested as follows in its decision:

> "This case involves the application of the secondary boycott provisions of the Act to a dispute in the construction industry, generated by automation and changes in technology."
>
> * * *
>
> "In order to preserve and protect for its members their traditional work, many of the construction unions have entered into written contracts with contractors which specify that the fabrication of component parts of houses and buildings will be limited in specified particulars and that it shall not constitute a violation of the collective-bargaining agreement for the unions to refuse to allow its members to handle such prebuilt products. *The decisions of the Board and courts do not challenge such written agreement where its exclusive purpose is preservation of work which local labor has traditionally performed. Such arrangements, the Supreme Court has held, are not interdicted by either Sections 8(b)(4) or 8(e) of the Act."* (188 NLRB at 231) (Emphasis added).

[6] The administrative law judge's analysis of the literal terms of the clause was specifically adopted by the Board (Pet. App. 15a at n. 5). Member Kennedy observed in his dissenting opinion in the instant action that

> "It is significant that Respondent Carpenters conceived Article XXII as a means of avoiding the Board's earlier decision (in the *Bender* case) that its actions against the performance of work on these modular houses were unlawful. Therefore, the Administrative Law Judge's analysis (based on the literal terms of the clause) is inadequate and should not be adopted." (Pet. App. 19a).

instituted the *Silver Bow* case[7] and charged that Article XXII violated § 8(e). The Board held that evidence regarding the strike and picketing to obtain Article XXII was insufficient to support a § 8(e) violation and dismissed the contractors' allegations on the ground that the express terms of Article XXII did not establish any secondary objectives. (Pet. App. 41a).[8]

The Board acknowledged that in its decision in the instant case, "The timing of the *Silver Bow* case, of course, prevented any consideration as to what effects, if any, later enforcement efforts would have, or any consideration of events which occurred subsequent to litigation." (Pet. App. 75a). In *Silver Bow*, there was clearly no occasion to consider the union's secondary pressures to enforce Article XXII, and the Board left such questions open for future litigation.[9] Contrary to the Governments' opposition *Silver Bow* was not in fact considered binding by the Board.

> "The General Counsel and the charging parties assert in this proceeding that *Silver Bow* does not preclude further consideration regarding the validity of Article XXII. I would agree that the decision does not make the matter *res judicata* or create collateral estoppel." (Pet. App. 75a).[10]

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[7] *United Brotherhood of Carpenters and Joiners of America, Local 112 AFL-CIO* (Silver Bow Employers Association), 200 NLRB 205 (1972) (hereinafter referred to as "*Silver Bow*").

[8] The Government's opposition incorrectly asserts that "given the evidence before it in *Silver Bow* . . . , the Board was warranted in finding [in the instant action] that Article XXII, when negotiated, was intended merely to preserve work . . . " (Brief in Opposition, p. 8); quite the contrary, the *Silver Bow* case was limited to the express terms of Article XXII and is therefore totally inapposite.

[9] See Order Denying Motions in *Silver Bow* which is set forth in the Appendix B which is attached to this Response. In footnote 3 of said Order the adjudication of the respondents' secondary pressures to enforce Article XXII is left open for future litigation. (See Pet. App. 2b.)

[10] Petitioner, Chamber, attempted to intervene and reopen the *Silver Bow* case in light of the issuance of the Complaint in the instant

(Footnote continued on following page.)

Moreover, as Member Kennedy correctly noted, post-entry conduct must be considered in examining the legality of the work preservation clause under § 8(e):

> "(*Silver Bow*) is not persuasive in view of the evidence of unlawful intent revealed by the subsequent enforcement efforts explicated on the record here. The Board has clearly held that the post-entry conduct does reveal initial secondary purpose for and entry into such an agreement." (Citations omitted) (Pet. App. 19a).

The third time the Board considered the legality of the carpenters' and trade council's boycott was the present action which was filed following respondents' commencement of secondary picketing and threats against manufacturers, dealers, subcontractors, and customers who were outside any bargaining relationship to enforce the clause against third party neutrals to preclude modular homes from the local housing market.

Since the economic advantages of construction of a modular home requires many, if not all, of the tasks enumerated in Section 3 of Article XXII to be performed at the factory, *viz:* the shingling of roofs; the installation of exterior siding and trim; and the installation of interior wallboards, paneling, trim, stairs, bannisters, doors, cabinets and shelving, etc. (Pet. App. 104a-105a); Article XXII is simply an implied agreement between the union and union contractors to refrain from doing any business with respect to modular homes.

The decision below found that the Union's enforcement of Article XXII violated § 8(b)(4)(B), but incorrectly held that

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(Footnote continued from preceding page.)

case but was unsuccessful. Notwithstanding the Board's subsequent Order in *Silver Bow* that the question of the respondent's subsequent enforcement of Article XXII might be the subject of future litigation (see note 9, *supra*), the Government now maintains that once a clause is found valid on its face, subsequent widespread boycott pressure found to violate 8(B)(4) cannot result in a reexamination of the initially limited opinion.

the clause did not similarly violate § 8(e), holding in effect that the "all surrounding circumstances" test was not applicable to § 8(e).

Notwithstanding that "all the surrounding circumstances" established § 8(b)(4)(B) violations in the *Bender* and instant cases, the Board held here it is

> "... not precluded from considering the validity of Article XXII *per se* distinguished from the manner of its enforcement ... " (Pet. App. 54a)

and erroneously limited the question of a § 8(e) violation to the literal terms of the clause. The Brief in Opposition admits that the express terms of Article XXII excluded modular housing from the market, but erroneously states on page 9 that

> "The fact that under some circumstances, " *'the* express terms *and the application of Article XXII'* " may have precluded " 'the introduction of modular housing in the Butte area' (Pet. 21), does not establish that the clause violated Section 8(e). (Brief in Opposition, p. 9) (Emphasis added).

The Board's failure to look beyond the express terms of the clause is in direct conflict with *National Woodwork, supra.*

B. The "all the surrounding circumstances" test applies with respect both to § 8(b)(4)(B) and § 8(e).

Sections 8(b)(4)(B) and 8(e) cannot be separated in relation to "all the surrounding circumstances." Although the Government acknowledges that *National Woodwork* requires an inquiry into "all the surrounding circumstances" to determine whether the agreement and its enforcement were calculated to achieve primary or secondary objectives (Brief in Opposition, p. 7), the Government's Brief compartmentalizes §§ 8(b)(4)(B) and 8(e), as well as each facet of the record.

The Government states:

> "To be sure, in some instances, the Union applied the agreement in an unlawful secondary manner, but that does not sap Article XXII of an (sic) possible lawful application." (Brief in Opposition, p. 10).

On the contrary, the uncontroverted evidence in the record establishes that the only possible application of Article XXII is secondary. As long as the clause stands, any customer in Butte who buys a modular home is prevented from obtaining the construction of a foundation, having the home "stitched" together, getting electrical, plumbing, and water hook-ups, etc. It is not necessary for the union to picket the homesite. As long as local construction firms and workers know of Article XXII's continued existence, no modular homes will be built. The contention that Article XXII does not violate § 8(e) because of some unexplained possibility of a lawful, nonsecondary application is empty speculation.

Moreover, the various facets of the circumstances in this case cannot be separated. In an effort to distract from Article XXII's secondary purpose, the Government disregards *National Woodwork's* "all surrounding circumstances" test and segregates the respondent's pre-Article XXII secondary pressures against modular home dealers and customers which the *Bender* case held was intended to keep modular housing out of the market; the respondents' attempt to circumvent the *Bender* decision by pressuring the contractors' association to agree to Article XXII; the subsequent enforcement of the insurmountable restrictions against third party neutrals; and the Board's holding in the instant case that such conduct violates § 8(b)(4)(B).

The lower court and the Government's Opposition disregard this Court's teachings in *National Woodwork* and *Pipefitters*[11] that the standard for determining whether a work

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[11] *NLRB* v. *Enterprise Association, et al.,* and *Pipefitters Local No. 638, et al.,* 429 U.S. 507 (1977) (referred to as either *"Enterprise"* or *"Pipefitters"*).

preservation clause violates §§ 8(b)(4)(B) and 8(e) are the same.[12]

The Board failed to address the cases cited by Member Kennedy in his dissent, where extrinsic evidence was considered with respect to § 8(e) violations. Likewise, the decision of the court below departs from its decision in *International Association of Machinists* (Marriott In-Flite Services), 197 NLRB 232 (1971), *aff'd.*, 491 F.2d 367, *cert. denied*, 419 U.S. 881 (1974), where it affirmed a Board decision which stated

> "[I]t would be illogical to find unlawful a strike . . . to force [an employer] to cease doing business with [another employer] under Section 8(b)(4)(B), while holding that a contract . . . designed to achieve the identical result [is] not proscribed by Section 8(e)." (197 NLRB at 237-238)

The work preservation clause in *National Woodwork, supra,* did not violate § 8(e) because of the existence of a bargaining relationship between the union and the entity against which the clause was enforced, and in *Pipefitters, supra,* because the validity of the clause under that section was not challenged (429 U.S. at 521 n.8). These cases do establish, however, that §§ 8(b)(4)(b) and 8(e) cannot be separated with regard to an analysis of the surrounding circumstances.

The Government opposition fails to respond why, consistent with principles of *National Woodwork* and *Pipefitters,* the "right to control" and "surrounding circumstances" tests should not be equally applicable to a violation of § 8(e).

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[12] In *Pipefitters* the court confirmed *in pari materia* treatment of §§ 8(b)(4)(B) and 8(e), as follows:

> [T]he scope of the prohibition is §§ 8(b)(4)(B) and 8(e) are essentially identical . . ." (429 U.S. at 521 n.8).

C. ***National labor policy proscribes union control through agreements creating geographical enclaves for local contractors.***

The Government's suggestion that the *Connell* decision,[13] is narrowly limited to "top down organizing" and labor's exemption from the antitrust laws ignores that the *Connell* case, *supra,* proscribed collective bargaining agreements which create geographical enclaves shielding local contractors from outside competition and held that such agreements violate § 8(e) of the Act.

In *Connell* the union entered into subcontracting agreements with local contractors which forbade subcontracts with non-union firms and thereby created a geographical enclave which protected local union contractors from outside competition. (421 U.S. at 624). In the instant action, the overbearing restrictions contained in Section 3 of Article XXII create the same type of geographical enclave which was analyzed in *Connell* to contravene national labor policy.

The Government's opposition also fails to address the clear conflict between the decision below and *Connell* which held that it is a violation of Section 8(e) for a labor organization to obtain or enforce restrictive agreements against persons outside a collective bargaining relationship and that §§ 8(b)(4)(B) and 8(e) must be read together.[14]

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[13] *Connell Construction Company, Inc.* v. *Plumbers Local 100,* 421 U.S. 616 (1975) (herein referred to as *"Connell"*).

[14] In *Connell* the Court stated that

> "(Section) 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment . . . . Section 8(e) was part of a legislative program designed to plug technical loopholes in § 8(b)(4)'s general prohibition of secondary activities. *In § 8(e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by § 8(b)(4).* See *National Woodwork Mfrs. Assn., supra,* 386 U.S. at 634,87 S. Ct. at 1262. (414 U.S. at 628).

The Government's disregard of a § 8(e) remedy in favor of a limited § 8(b)(4)(B) remedy is clearly inconsistent with §8(e) and the mandate of the *Connell* decision. To limit the remedy to § 8(b)(4)(B) under these circumstances would require manufacturers and dealers as well as small non-union contractors and customers to file charges with the NLRB every time Article XXII has a secondary effect. Such a remedy is not reasonable or practicable and disregards the intendment of § 8(e) of the Act. The remedy for a § 8(e) violation is expungement of the clause.

II. The test whether Article XXII violated § 8(e) is not whether the respondents miscalculated or mistook the circumstances under which the clause could be enforced against third-party neutrals but rather the "foreseeable consequences" of precluding modular homes in the Butte area.

The Brief in Opposition erroneously states that *NLRB* v. *Operating Engineers Local No. 825* (Burns and Roe, Inc.), 400 U.S. 297 (1971)

> "...merely holds that where the union engages in 'flagrant secondary conduct'" (*id.* at 305), it is charged with foreseeing that its conduct would sufficiently disrupt business relationships to be unlawful under Section 8(b)(4)(B). (Brief in Opposition, p. 8).

On the contrary, in *Burns and Roe, supra,* the Court determined that the union's pressures had a secondary object on the basis that the "clear implication" and the "foreseeable consequence" of the union's demands were that the neutral was required either to force a change in the primary employers policy with respect to job assignments or to terminate its contract with the employer. The Court's reference to the

"flagrancy" of the union's secondary conduct was merely descriptive rather than determinative of the conduct in that case. (400 U.S. at 304-305).

In the instant case, the respondents must be charged with knowledge of the foreseeable consequences that the clause, if followed, would make it economically impossible to bring modular homes into the Butte market, and the consequences of the concommitant § 8(b)(4) activity with the actual loss, rather than preservation, of carpenters' jobs.

The lower court's reliance upon the self-supporting assertions of the union's business agent that the clause was intended to preserve work and resulted in a miscalculation of the circumstances under which the clause could be enforced (Pet. App. 9a) is clearly contrary to *Burns* and *Roe.* The Government's Opposition incorrectly defends the Board's and the lower court's utilization of the wrong test to determine the secondary nature of Article XXII. This case presents the Court with the opportunity to hold that the *Burns* v. *Roe* "forseeable consequences" test is equally applicable in determining a § 8(e) violation.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX B[15]

Butte, Mont.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA, LOCAL #112
AFL-CIO

and Cases 19-CC-497
19-CE-19

SILVER BOW EMPLOYERS' ASSOCIATION
AND BUTTE CONTRACTORS' ASSOCIATION

ORDER DENYING MOTIONS

On November 9, 1972, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which it adopted the findings, conclusions and recommendation of the Administrative Law Judge[2] as contained in his Decision of May 22, 1972, and dismissed the complaint in its entirety.

Thereafter, on June 4, 1973, the Chamber of Commerce of the United States of America filed a Motion to Intervene in this proceeding in order to file an attached Motion for Reconsideration and Memorandum in support thereof, jointly entered into by the Chamber of Commerce and the Charging Parties herein. The contention is made that evidence relevant to the instant proceeding, which was discovered since the Board's decision and will be presented in a pending unfair labor proceeding in *United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO Summit Valley Industries, Inc., et al.,* Cases 19-CC-588, 19-CC-591, 19-CC-604, 19-CC-

[15] Appendix A is attached to the Petition for Writ of Certiorari.

604-2, 19-CE-21, and 19-CD-212, warrants reconsideration of the Decision and Order. It is requested that the Board grant reconsideration but stay a decision thereon pending issuance of the Administrative Law Judge's Decision in the aforesaid unfair labor practice proceeding and thereafter consolidate the two proceedings for oral argument and *en banc* decision.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Chamber of Commerce's Motion to Intervene be, and it hereby is, denied as lacking merit.

IT IS FURTHER ORDERED that the Motion for Reconsideration be, and it hereby is, denied as it is lacking in merit and contains nothing not previously considered by the Board.[3]

IT IS FURTHER ORDERED that the request for oral argument be, and it hereby is, denied.

Dated, Washington, D.C., June 27, 1973.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

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[1] 200 NLRB No. 42.

[2] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[3] To the extent that the Motion for Reconsideration is based on subsequent events giving rise to the filing of charges and the issuance of a consolidated complaint in *Summit Valley Industries, Inc.*, Cases 19-CC-588, et al., those events and the legal consequences flowing therefrom can be appropriately litigated in that proceeding and, if warranted, a suitable remedy will be provided.